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NO.

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1985

SOUTHERN PACIFIC TRANSPORTATION COMPANY,

Petitioner

v.

HARCON BARGE COMPANY, INC., D&G BOAT RENTALS, INC. AND THE M/V CHARLES D, TIDEWATER-VENICE, INC. AND THE M/V IBERVILLE, ARTHUR SMITH CORPORATION AND THE M/V I.C. HOSKINS, AND CANAL BARGE COMPANY AND THE M/V MARIAN HAGESTAD

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Petitioner applies for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit for review of the following procedural questions:

I. Does the Fifth Circuit's "bright-line" rule conflict with the Federal Rules of Civil Procedure and the Federal Rules of Appellate Procedure, create waste and confusion and arbitraily denies petitioner of its right to appeal?

II. Is a motion to amend the judgment to reflect an offer of judgment pursuant to Federal Rule of Civil Procedure 68 properly made under Rule 60 which does not affect a pending notice of appeal?

III. Does a motion to amend the judgment in one of four consolidated cases affect the rights of petitioner to appeal in the other cases?

IV. Did the court err in failing to invoke Rule 2 of the Federal Rules of Appellate Procedure to allow petitioner's appeal to go forward?

LIST OF PARTIES

The parties to the Fifth Circuit proceedings were Southern Pacific Transportation Company, the Government of the United States, Harcon Barge Company, Inc., D&G Boat Rentals, Inc. and the Motor Vessel Charles D. Arthur Smith Corporation and Tidewater-Venice, Inc. and the Motor Vessel Iberville, Canal Barge Company and the Motor Vessel Marian Hagestad.

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DECISIONS BELOW

This case has had a complicated procedural history, which is the subject of this petition. Decisions entered are as follows:

1. Opinion and judgment of United States District Court for the Western District of Louisiana dated December 8, 1982, unreported.
2. Amended judgment of the United States District Court for the Western District of Louisiana dated January 25, 1983, unreported.
3. Order of Court of Appeals denying motions to dismiss appeal dated June 22, 1983, unreported.
4. Order of Court of Appeals denying motions for reconsideration of motion to dismiss appeal dated September 14, 1983, unreported.

5. *Harcon Barge Company v. D&G Boat Rentals, Inc.*, 746 F.2d 278 (5th Cir 1984)
6. *Harcon Barge Company v. D&G Boat Rentals, Inc.*, 760 F.2d 86 (5th Cir. 1985) (ordering rehearing en banc)
7. *Harcon Barge Company v. D&G Boat Rentals, Inc.*, __F.2d__, No. 82-4584, slip opinion, (5th Cir. 1986) (en Banc.)

JURISDICTION

Jurisdiction of the trial court was based upon the admiralty and maritime jurisdiction of the court, 28 U.S.C. § 1333. The decision in question by an en banc panel of the United States Court of Appeals for the Fifth Circuit was entered on March 12, 1986.

This court has jurisdiction pursuant to 28 U.S.C. § 1254.

STATUTES INVOLVED

This petition raised issues concerning the following provisions of the Federal Rules of Civil Procedure and Federal Rules of Appellant Procedure:

1. Fed.R.Civ.P.42

Rule 42. Consolidation; Separate Trials

(a) Consolidation. When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

(b) Separate Trials. The court, in furtherance of convenience or to avoid prejudice, or when separate trials

will be conducive to expedition and economy, may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues, always preserving inviolate the right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States. (As amended Feb. 28, 1966, eff. July 1, 1966.)

2. Fed.R.Civ.P.59

Rule 59. New Trials; Amendment of Judgment

(a) Grounds. A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States; and (2) in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of the United States. On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

(b) Time for Motion. A motion for a new trial shall be served not later than 10 days after the entry of the judgment.

(c) Time for Serving affidavits. When a motion for new trial is based upon affidavits they shall be served with the motion. The opposing party has 10 days after such service within which to serve opposing affidavits, which period may be extended for an additional period

not exceeding 20 days either by the court for good cause shown or by the parties by written stipulation. The court may permit reply affidavits.

(d) On Initiative of Court. Not later than 10 days after entry of judgment the court of its own initiative may order a new trial for any reason for which it might have granted a new trial on motion of a party. After giving the parties notice and an opportunity to be heard on the matter, the court may grant a motion for a new trial, timely served, for a reason not stated in the motion. In either case, the court shall specify in the order the grounds therefor.

(e) Motion to Alter or Amend a Judgment. A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment.
(As amended Dec. 27, 1946, eff. March 19, 1948; Feb. 28, 1966, eff. July 1, 1966.)

3. Fed. R. Civ.P.60

Rule 60. Relief from Judgment or Order
(a) Clerical Mistakes. Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as

the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, Etc. On Motion an upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C., § 1655, or to set aside a judgment for fraud upon the

court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.
(As amended Dec. 27, 1946, eff. March 19, 1948; Dec. 29, 1948, eff. Oct. 20, 1949.)

4. Fed.R.Civ.P.68

Rule 68. Offer of Judgment
At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against him for the money or property or to the effect specified in his offer, with costs then accured. If within 10 days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon the clerk shall enter judgment. An offer not accepted shall be deemed withdrawn and evidence thereof is not admissable except in a proceeding to determine costs. If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer. The fact that an offer is made but not accepted does not preclude a subsequent offer. When the liability of one party to another has been determined by verdict or order or judgment, but the amount or extent of the liability remains to be determined by further proceedings, the party adjudged liable may make an offer of judgment, which shall have the same effect as an offer made before trial if it is served within a reasonable time not less than 10 days prior to the commencement

of hearings to determine amount or extent of liability. (As amended Dec. 27, 1946, eff. March 19, 1948; Feb. 28, 1966, eff. July 1, 1966.)

5.Fed.R.App.P.2

Rule 2. Suspension of Rules

In the interest of expediting decision, or for other good cause shown, a court of appeals may, except as otherwise provided in Rule 26(b), suspend the requirements or provisions of any of these rules in a particular case on application of a party or on its own motion and may order proceedings in accordance with its direction.

6. Fed.R.App.P.4

Rule 4. Appeal as of Right - When Taken

(a) Appeals in Civil Cases.

(1) In a civil case in which an appeal is permitted by law as of right from a district court to a court of appeals the notice of appeal required by Rule 3 shall be filed with the clerk of the district court within 30 days after the date of entry of the judgment or order appealed from; but if the United States or an officer or agency thereof is a party, the notice of appeal may be filed by any party within 60 days after such entry. If a notice of appeal is mistakenly filed in the court of appeals, the clerk of the court of appeals shall note thereon the date on which it was received and transmit it to the clerk of the district court and it shall be deemed filed in the district court on the date so noted.

(2) Except as provided in (a)(4) of this Rule 4, a notice of appeal filed after the announcement of a decision or order but before the entry of the judgment or order shall be treated as filed after such entry and on the day thereof.

(3) If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within 14 days after the date on which the first notice of appeal was filed, or within the time otherwise prescribed by this Rule 4(a), whichever period last expries.

(4) If a timely motion under the Federal Rules of Civil Procedure is filed in the district court by any party: (i) for judgment under Rule 50(b); (ii) under rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; (iii) under Rule 59 to alter or amend the judgment; or (iv) under Rule 59 for a new trial, the time for appeal for all parties shall run from the entry of the order denying a new trial or granting or denying any other such motion. A notice of appeal filed before the disposition of any of the above motions shall have no effect. A new notice of appeal must be filed within the prescribed time measured from the entry of the order disposing of the motion as provided above. No additional fees shall be required for such filing.

(5) The district court, upon a showing of excusable neglect or good cause, may extend the time for filing a notice of appeal upon motion filed not later than 30 days after the expiration of the time prescribed by this Rule 4(a). Any such motion which is filed before expiration of the prescribed time may be ex parte unless the court otherwise requires. Notice of any such motion which is filed after expiration of the prescribed time shall be given to the other parties in accordance with local rules. No such extension shall exceed 30 days past such prescribed time or 10 days from the date of entry of the order granting the motion, whichever occurs later.

(6) A judgment or order is entered within the meaning of this Rule 4(a) when it is entered in compliance

with Rules 58 and 79 (a) of the Federal Rules of Civil Procedure.

(b) Appeals in Criminal Cases. In a criminal case the notice of appeal by a defendant shall be filed in the district court within 10 days after the entry of the judgment or order appealed from. A notice of appeal filed after the announcement of a decision, sentence or order but before entry of the judgment or order shall be treated as filed after such entry and on the day thereof. If a timely motion in arrest of judgment or for a new trial on any ground other than newly discovered evidence has been made, an appeal from a judgment of conviction may be taken within 10 days after the entry of an order denying the motion. A motion for a new trial based on the ground of newly discovered evidence will similarly extend the time for appeal from a judgment of conviction if the motion is made before or within 10 days after entry of the judgment. When an appeal by the government is authorized by statute, the notice of appeal shall be filed in the district court within 30 days after the entry of the judgment or order appealed from. A judgment or order is entered within the meaning of this subdivision when it is entered in the criminal docket. Upon a showing of excusable neglect the district court may, before or after the time has expired, with or without motion and notice, extend the time for filing a notice of appeal for a period not to exceed 30 days from the expiration of the time otherwise prescribed by this subdivision.
(Amended Apr. 30, 1979, effective Aug. 1, 1979.)

STATEMENT OF THE CASE

The present appeal arises out of four collisions by vessels to the Southern Pacific Transportation Company (Southern Pacific) railroad bridge over the Atchafalaya

River at Berwick, Louisiana. The four collisions occurred in a four week period beginning April 7, 1979. The four collisions gave rise to five lawsuits which were consolidated for trial before the United States District Court for the Western District of Louisiana. In four cases, Southern Pacific, as plaintiff, sought recovery from four vessels and their respective owners for damages to the railroad bridge. Named as defendants in these lawsuits were the M/V Charles D and D&G Boat Rentals, Inc., (D&G), the M/V Iberville and Tidewater-Venice, Inc. (Tidewater), the M/V I.C. Hoskins and Arthur Smith Corporation and the M/V Marian Hagestad and Canal Barge Company (Canal) In the other case, Southern Pacific was named as a defendant by Harcon Barge Company, the barge owner, for damages caused to its barge by the design of the bridge which the barge struck.

After a lengthy trial, the court issued its judgment on December 8, 1982 which was mailed to all counsel that day. (Appendix A.) A docket notation, "DKT-D", was made in one of the consolidated cases on December 14, 1982. Southern Pacific filed its notice of appeal to the United States Fifth Circuit Court of Appeals on December 21, 1982 contestiing awards made by the judgment as to each claim in the consolidated cases.(Appendix B.)

On that day, Tidewater filed a "motion to amend the judgment" to avail itself of an offer of judgment made prior to trial pursuant to Fed.R.Civ.P.68. (Appendix C.) The motion did not stipulate the rule under which it was brought. D&G and Canal later filed notices of cross appeal on January 7, 1983 and January 17, 1983 respectively. On January 25, 1983, the court granted Tidewater's Motion to Amend the Judgment to reflect its earlier offer of judgment. (Appendix D.) On January 31, 1983, a notation was made on the court's docket, "DKT-D".

On June 3, 1983, all appellees and appellees/cross appellants brought Motions to Dismiss Southern Pacific's appeal contending that Tidewater's Motion to Amend the Judgment was made pursuant to Fed.R.Civ.P.59(e) and the granting of Tidewater's Motion to Amend the Judgment nullified Southern Pacific's Notice of Appeal according to Rule 4(a)(4) of the Federal Rules of Appellate Procedure. Movers contended that failure to refile a Notice of Appeal from an Amended Judgment barred Southern Pacific's appeal. Southern Pacific contended that the motion was properly brought under Fed.R.Civ.P.60 which did not affect the status of its appeal.

On June 22, 1983, the Court of Appeals unanimously denied the Motions to Dismiss the appeal. (Appendix E.) Motions for reconsideration were filed and these motions were also denied by the Court on October 14, 1983. (Appendix F.)

The case was argued on July 25, 1984 and then submiitted for decision on the merits. By letter of August 25, 1985, the Court again requested briefing on the issue of timeliness of the appeal and the issue as to whether or not a judgment or amended judgment had actually been entered. The decision, *Harcon Barge Company v. D&G Boat Rentals, et al*, 476 F.2d 278 (5th Cir. 1984), was rendered on November 12, 1984. (Appendix G.) The panel held, as a preliminary matter, that Tidewater's motion to amend the judgment was a Rule 59(e) motion which nullified Southern Pacific's notice of appeal. The Court did not reach the merits of the case. The appeal was dismissed for lack of jurisdiction.

On December 9, 1984, Southern Pacific filed a suggestion for rehearing en banc based on the conflict in the decisions of the Fifth Circuit which arose following the Court's opinion in *Willie v. Continental Oil Company, et al*,

476 F.2d 1041, (5th Cir. 1984). On April 23, 1985, in *Harcon Barge v. D&G Boat Rentals, Inc.*, 760 F.2d 86 (5th Cir. 1985), the Court ordered the case be reheard en banc in a consolidated hearing with *Willie v. Continental Oil Company, et al.* (Appendix H.)

The en banc hearing was ordered to resolve the conflict concerning whether or not a post-judgment motion to amend the judgment pursuant to a Rule 68 offer of judgment was properly brought under Rule 59(e) or Rule 60(b)(1). The en banc opinion was rendered on March 12, 1986. (Appendix I.) That Court did not address the specific questions of whether the Tidewater motion was made pursuant to Rule 59(e) or Rule 60(b). Instead, it promolgated the "bright-line" rule and held that *any* post-judgment motion to alter or amend the judgment served within ten days after the entry of judgment, other than a motion to correct purely clerical errors covered by Rule 60(a), is within the unrestricted scope of Rule 59(e) and must, however designated by the movant, be considered as a Rule 59(e) motion for the purposes of Fed.R. App.P.4.(a)(4). If, on the other hand, the motion asked for some relief other than the correction of a purely clerical error and is served after the ten day limit, then Rule 60(b) governs its timeliness and effect.

Based upon the "bright-line" rule, the Court characterized the Tidewater motion to amend the judgment as a Rule 59(e) motion, which nullified Southern Pacific's previously filed notice of appeal. Petitioner's appeal was therefore dismissed.

This Writ of Certiorari is sought by petitioner to this High Court to remedy the injustice created by the Court of Appeal's analysis of post-judgment motions and its adoption of the "bright-line" rule which has arbitrarily denied petitioner of its right to appeal the trial court decision

in this matter.

ARGUMENT

I. DOES THE FIFTH CIRCUIT'S "BRIGHT-LINE" RULE CONFLICT WITH THE FEDERAL RULES OF CIVIL PROCEDURE AND THE FEDERAL RULES OF APPELLATE PROCEDURE, CREATE WASTE AND CONFUSION AND ARBITRAILY DENIES PETITIONER OF ITS RIGHT TO APPEAL?

The en banc panel dismissed petitioner's appeal because, under its "bright-line" rule, the Tidewater motion to amend the judgment to reflect an offer of judgment, *must* be characterized as a Rule 59(e) motion which nullifies petitioner's previously filed notice of appeal. The Court of Appeals did not examine the substance of Tidewater's motion nor did it determine if Tidewater's motion was made pursuant to Rule 59(e) or Rule 60(b)(1). Instead, it held that, although different under the Federal Rules of Civil Procedure, motions under Rule 59(e) and 60(b) provide similar relief - change in the judgment. These should therefore be treated similarly for purposes of Rule 4(a)(4) of the Federal Rules of Appellate Procedure. Because motions under Rule 59(e) must be served within 10 days of entry of judgment, while motions under Rule 60(b) be make within one year of that date, the court found that a uniform test was needed to signal when a new notice of appeal was necessary. The Court therefore enacted its "bright-line" rule as a necessary "complement" to this Court's decision in *Griggs v. Provident Consumer Discount Company,* 459 U.S. 56, 103 S.Ct. 400 (1982).

The "bright-line" rule is totally arbitrary. Any post-trial motion served within 10 days of the entry of judgment is either a 59(e) motion or a Rule 60(a) motion. The rule

completely rejects the possibility of a motion filed under Rule 60(b) within 10 days of entry of judgment.

Surely the Court of Appeals went beyond reason. Fed.R.App.P.4 sets forth precisely the types of post-trial motions which nullify a pending notice of appeal. These are post-trial motions made under Rules 50(b), 52(b), and 59 of the Federal Rules of Civil Procedure. A Rule 60 motion has no effect on a pending notice of appeal under Rule 4(a)(4).

There is no basis for the court's decision. In *Griggs*, the court examined the interaction between Fed.R.App.P. 4(a)(4) and Rule 59(e). That decision did not deal with the application of Rule 60. There is no reason to "compliment" that opinion with a rule that judicially eradicates Fed.R.Civ.P. 60(b). It is not within the province of the Court of Appeal to deny the possibility that such a motion might exist.

The "bright-line" rule creates waste, expands the instances in which multiple notices of appeal will be required, and creates a multitude of problems. How, for example, would one consider a motion for extension of time to file a motion to alter or amend the judgment. Obviously, such a motion does not fall within the scope of Rule 60(a) to correct clerical error and, based upon the court's logic, after every such motion, served within ten days of the entry of judgment, a new notice of appeal would be required.

Timeliness, under the "bright-line" rule is based upon the date the motion is served and not filed. Thus, analogizing the "bright-line" rule to the rules regarding service of a Rule 59(e) motion, any post-judgment motion to alter or amend the judgment with a certificate of service dated within 10 days of entry of judgment is potentially a Rule 59(e) motion which is capable of nullifying a pending notice of appeal. Litigants must thus maintain a constant lookout. Any motion served within ten days of entry of

judgment which does not correct a clerical error is capable of nullifying an appeal.

The Fifth Circuit's finding that to construe a motion as a Rule 60(b) motion in order to preserve an appeal creates problems of filing multiple notices of appeal is totally illogical. If a Rule 60(b) motion is filed after a pending notice of appeal, it has no effect on the notice of appeal. No further notice or multiple notice would therefore be required.

There is no need to create a rule which expands the scope of Fed.R.App.P.4(a)(4) or which places different significance on a Rule 60(b) motion based on whether it is filed within 10 days of entry of judgment. It has never been the intent of the Federal Rule of Appellate Procedure to include a Rule 60(b) motion in the scope of Rule 4(a)(4) nor the intent of the Federal Rules of Civil Procedure to elimiinate the possibility of a Rule 60(b) motion within 10 days of entry of judgment. The "bright-line" rule is not only in conflict with the spirit of these rules but creates waste and confusion and in particular, arbitrarily denies petitioner of its right to appeal. This Court should reject this rule.

II. IS A MOTION TO AMEND THE JUDGMENT TO REFLECT AN OFFER OF JUDGMENT PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 68 PROPERLY MADE UNDER RULE 60, WHICH DOES NOT AFFECT A PENDIING NOTICE OF APPEAL?

In its first opinion the panel characterized Tidewater's motion as a Rule 59(e) motion. On rehearing, that part of the panel opinion was vacated. This issue was left unaddressed in light of the Court's adoption of the "bright-line" rule. Petitioner submits the Tidewater amendment was properly made under Rule 60.

On December 21, 1981, Tidewater filed a motion to amend the judgment. The motion did not stipulate the rule

under which Tidewater was proceeding to amend the judgment. The motion sought to avail Tidewater of the provisions of Rule 68 of the Federal Rules of Civil Procedure. Rule 68 provides that if a plaintiff rejects a defendant's settlement offer perfected in accordance with that rule and if "the judgment finally obtained by the offeree is no more favorable than the offer", the plaintiff *must* pay costs incurred after making the offer. (Emphasis added.)

Rule 68 relief is merely a way for a party to limit its costs. Rule 68 relief allows the court no discretion in its application. *Waters v. Heublein*, 485 F.Supp. 110 (N.D.Cal. 1979); *Mr. Hanger, Inc. v. Cut Rate Plastic Hangers, Inc.*, 63 F.R.D. 607 (E.D.N.Y. 1974). By its very terms, Tidewater's motion to amend the judgment did not question the substantive correctness of the judgment or call upon the court to reconsider its fact findings or conclusions of law. Tidewater sought only to limit the costs which it would have to pay because of the judgment. The amendment did not affect the substantive rights of any of the parties to the litigation. It merely limited the costs which one defendant, Tidewater, would have to pay in the consolidated action. The motion was not within the contemplation of Rule 59(e). It dealt not with the underlying judgment, but a matter ancillary to the judgment. *White v. New Hampshire Department of Employment Sec.*, 455 U.S. 445, 102 S.Ct. 1162 (1982); *Miller v. Leavenwrith-Jefferson Electric Cooperative, Inc.*, 653 F.2d 1378 (10th Cir. 1981).

A post-trial motion to award, deny, or otherwise consider costs is properly made pursuant to Federal Rule of Civil Procedures 60(b)(1). *Liberty Mutual Insurance Company v. E.E.O.C.*, 691 F.2d 438 (9th Cir. 1982). Such a motion does not alter or amend the judgment but merely seeks what is due because of the judgment. *White v. New Hampshire Department of Employment Sec., supra.* Tidewater's motion to amend the judgment is thus maintainable under

Rule 60(b)(1). This rule permits correction of a judgment which is erroneous and caused by mistake, inadvertence, surprise or an excusable neglect. *West Virginia Oil and Gas Company v. George Breece Lumber Company*, 213 F.2d 702 (5th Cir. 1954); *Jones v. Anderson-Tully Company, 722 F.2d 211 (5th Cir. 1984); Warner v. City of Bay St. Louis*, 526 F.2d 1211 (5th Cir. 1976).

Additionally, there is authority for finding that the Tidewater motioin was properly filed under Rule 60(a). An amendment to the judgment which seeks to correct a matter of right is properly made pursuant to Federal Rule of Civil Procedure 60(a). *Glick v. White Motor Company*, 317 F.Supp 42 (E.D.Pa. 1970). In *Glick*, the court held that an amendment to a judgment to allow prejudgment interest in a diversity case was governed by Rule 60(a) where the judgment failed to authorize interest as allowed by state law. Examining the statute, the court found its provisions mandatory. It allowed no judicial discretion. Accordingly, the court concluded that the motion to amend the judgment to allow prejudgment interest was properly made under Rule 60(a).

In *Hegger v. Green*, 91 F.R.D. 595 (E.D.N.Y. 1981) the court found that an amendment to the judgment to add an award of prejudgment interest was made pursuant to Rule 60(a). The amendment allowed "a mechanical ascertainment of interest" and was found to be a "ministerial oversight", remedial as a clerical error under Rule 60(a). *Hegger* at 598. The court noted that Rule 60(a) is not limited to errors in the clerk's office. "The term 'clerical mistake' does not mean that it must be made by the clerk... It is the type of mistake that does not involve legal decision or judgment by an attorney". *Hegger* at 597. Tidewater was entitled to limit its costs as a matter of right. The amended judgment recited only the operative facts in the record. An amendment to correct such type of oversight is

made by Rule 60(a). *Matter of Cobb,* 750 F.2d 477 (5th Cir. 1985).

The en banc opinion does not deny that Tidewater's motion could be brought under Rule 60(b)(1), but only that under the "bright-line" rule, the motion must be characterized as a 59(e) motion. The Court of Appeals erred as a matter of law. The motion is properly characterized under Rule 60(b)(1) and also under Rule 60(a). In either case, the motion would not affect the status of Southern Pacific's appeal.

III. DOES A MOTION TO AMEND THE JUDGMENT IN ONE OF FOUR CONSOLIDATED CASES AFFECT THE RIGHTS OF PETITIONER TO APPEAL IN THE OTHER CASES?

The five cases before the court were consolidated for purposes of trial. Although one judgment was rendered, it specified the various liabilities of each particular defendant. (Appendix A.) Even if the Tidewater motion to amend the judgment were found to be a Rule 59(e) motion, the amended judgment limited only the costs which one party, Tidewater, would have to pay. (Appendix B.) It did not affect the other parties. The Court of Appeals erred in fiinding that actions by Tidewater could prejudice petitioner's appellate rights against the other parties to the consolidated action. There is no authority for this reasoning.

Parties may not by consolidation be deprived of some substantive right available to them in an individual suit once consolidated. "The actions [do] not loose their separate identities for purposes of consolidation. *Alfred Dunhill of London v. Republic of China,* 425 U.S. 682, 735, 96 S.Ct. 1854 1880 (1976). Surely, if by consolidation, Southern Pacific's appellate rights regarding all parties

other than Tidewater are affected by Tidewater's motion, then consolidation has deprived petitioner of its precious right of appeal. There is no authority for the Court's conclusion nor was it within the spirit of Fed.R.Civ.P.42.

IV. DID THE COURT ERR IN FAIILING TO INVOKE RULE 2 OF THE FEDERAL RULES OF APPELLATE PROCEDURE TO ALLOW PETITIONER'S APPEAL TO GO FORWARD?

Rule 2 of the Federal Rules of Appellate Procedure provides that for good cause "a Court of Appeals may, except where provided in Rule 26(a), suspend the requirements or provisions in a particular case". Accordiing to the Advisory Committee Notes, the Rule "contains the general suthorization to the courts to relieve litigants of the consequences of default where manifest injustice would otherwise result".

If petitioner's notice of appeal was defective, then certainly there exists no better case for application of Fed.R.App.P.2, which would allow petitioners to proceed to the merits. No party has been prejudiced by petitioner's action in this case. Southern Pacific initially filed a timely notice of appeal. Both the court and opposing parties were notified of the intent to appeal. D&G and Canal both filed cross appeals to Southern Pacific's appeal. There was never a doubt of petitioner's intent to appeal.

The case has been fraught with technical uncertainties. The Court of Appeals could not determine, initially, whether or not any judgment had in fact been entered either from the original judgment or amended judgment. The motion filed by Tidewater was never designated under any particular rule. Surely, at the very least, there are strong arguments supporting characterization of

Tidewater's motion to amend the judgment under Rule 60.

To dismiss this appeal and prevent Southern Pacific from having its case addressed on the merits flies in the face of this Court's declaration that it is "too late in the day and entirely contrary to the spirit of the Federal Rules of Civil Procedure for a decision to be avoided on the basis of such mere technicalities". *Forman v. Davis,* 371 U.S. 178, 181, 83 S.Ct. 227, 230 (1962). To do so would place form over substance and deny petitioner of one of its most precious rights.

The Court of Appeals has the power to suspend application of its rules. It erred in not using its powers under Rule 2 to allow petitioner's appeal to go forward.

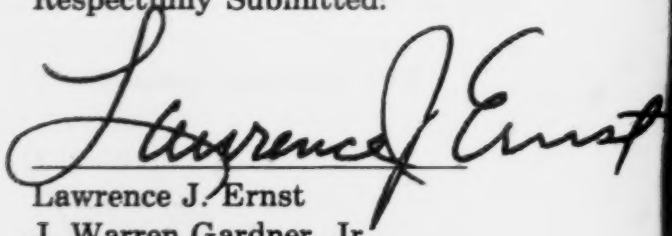
CONCLUSION

The Fifth Circuit's decision in *Harcon Barge Co., Inc.,* raises serious questions concerning appellate procedure and jurisdiction which have yet to be addressed by this High Court. The Fifth Circuit's adoption of the "bright-line" rule contradicts the spirit and purpose of both the Federal Rules of Civil Procedure and Federal Rules of Appellate Procedure. It creates waste and confusion and most importantly, has arbitrarily denied petitioner of its right to appeal.

The Fifth Circuit's error in adopting the "bright-line" rule as well as that court's erroneous analysis of post-judgment motions and their effect on consolidated actions have created a grave injustice which merit review and reversal by this court.

For these reasons, a Writ of Certiorari should issue to review the decision of the United States Court of Appeals for the Fifth Circuit.

Respectfully Submitted:

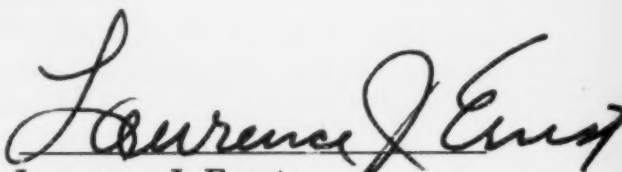


Lawrence J. Ernst
J. Warren Gardner, Jr.
Christovich & Kearney
1900 American Bank Building
New Orleans, Louisiana 70130
(504) 561-5700
Attorneys for Petitioner
Southern Pacific Transportation
Company

CERTIFICATE

I hereby certify that a copy of the above and foregoing has been mailed by U.S. Mail to all counsel of record, this 9th day of June, 1986.

New Orleans, Louisiana.



Lawrence J. Ernst
J. Warren Gardner, Jr.

NO. 85-2015

Supreme Court, U.S.
FILED
JUN 9 1986
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1985

SOUTHERN PACIFIC TRANSPORTATION COMPANY,

Petitioner

v.

HARCON BARGE COMPANY, INC., D&G BOAT RENTALS, INC. AND THE M/V CHARLES D, TIDEWATER-VENICE, INC. AND THE M/V IBERVILLE, ARTHUR SMITH CORPORATION AND THE M/V I.C. HOSKINS, AND CANAL BARGE COMPANY AND THE M/V MARIAN HAGESTAD

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

Lawrence J. Ernst
J. Warren Gardner, Jr.
Christovich & Kearney
1900 American Bank Building
New Orleans, Louisiana 70130
(504) 561-5700

Counsel for Petitioner

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

75 pp

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APPENDIX A

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION
SECTION S

Filed Dec 8 1982

HARCON BARGE COMPANY, INC.
VS. CIVIL ACTION NUMBER
D&G BOAT RENTALS, INC. 791592

SOUTHERN PACIFIC TRANSPORTATION CO.
VS. CIVIL ACTION NUMBER
M/V I. C. HOSKINS, ET AL 800511

SOUTHERN TRANSPORTATION CO.
VS. CIVIL ACTION NUMBER
M/V IBERVILLE, ET AL 800512

SOUTHERN PACIFIC TRANSPORTATION CO.
VS. CIVIL ACTION NUMBER
M/V CHARLES D, ET AL 800513

SOUTHERN PACIFIC TRANSPORTATION CO.
VS. CIVIL ACTION NUMBER
M/V MARIAN HAGESTAD, ET AL 800514

JUDGMENT

These consolidated cases came on for trial before the Court, District Judge John M. Shaw presiding. After hearing the law and the evidence presented, and in accordance with the Findings of Fact and Conclusions of Law filed herewith,

It is ORDERED, ADJUDGED AND DECREED that there be judgment herein in favor of plaintiff, Harcon Barge Company, and against defendant, Southern Pacific Transportation Company, in the amount of $21,629.68, with 9.07% interest from April 9, 1979, until paid, Southern Pacific to bear costs.

It is further ORDERED, ADJUDGED AND DECREED that there be judgment herein in favor of defendants, M/V I. C. Hoskins and the Arthur Smith Corporation, dismissing the claims of Southern Pacific Transportation Company against them, Southern Pacific to bear costs.

It is further ORDERED, ADJUDGED AND DECREED that there be judgment herein in favor of plaintiff, Southern Pacific Transportation Company, and against M/V Iberville and Tidewater Venice, Inc., in the amount of TWO THOUSAND AND NO/100 ($2,000.00) DOLLARS, with 9.07% interest from April 25, 1979, until paid, and in favor of the United States of America, dismissing the third party demand of defendants, M/V Iberville and Tidewater Venice, Inc. to bear costs.

It is further ORDERED, ADJUDGED AND DECREED that there be judgment herein in favor of plaintiff, Southern Pacific Transportation Company, and agaiinst M/V Charles D and D&G Boat Rentals in the amount of FORTY THOUSAND AND NO/100 ($40,000.00) DOLLARS, wiith 9.07% interest from April 25, 1979, until paid, defendants, M/V Charles D and D&G Boat Rentals, to bear costs.

It is further ORDERED, ADJEDGED AND DECREED that there be judgment herein in favor of plaintiff, Southern Pacific Transportation Company, and against M/V Marian Hagestad and Canal Barge Company, in the amount of EIGHT HUNDRED AND NO/100 ($800.00) DOLLARS, with 9.07% interest from April 25, 1979, until paid, defendants, M/V Marian Hagestad and Canal Barge Company to bear costs.

Opelousas, Louisiana, December 8, 1982.

/s/

JOHN M. SHAW
UNITED STATES DISTRICT JUDGE

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

Filed Dec 21 1982

HARCON BARGE COMPANY, INC.	*	CIVIL ACTION
VS.	*	NO. 79-1592
D&G BOAT RENTALS, INC.	*	SECTION "S"

****

SOUTHERN PACIFIC TRANSPORTATION CO.	*	CIVIL ACTION
VS.	*	NO. 80-0511
M/V I. C. HOSKINS, ET AL	*	SECTION "S"

****

SOUTHERN PACIFIC TRANSPORTATION CO.	*	CIVIL ACTION
VS.	*	NO. 80-0512
M/V IBERVILLE, ET AL	*	SECTION "S"

****

SOUTHERN PACIFIC TRANSPORTATION CO.	*	CIVIL ACTION
VS.	*	NO. 80-0513
M/V CHARLES D, ET AL	*	SECTION "S"

****

SOUTHERN PACIFIC TRANSPORTATION CO.	*	CIVIL ACTION
VS.	*	NO. 80-0514
M/V MARIAN HAGESTAD, ET AL	*	SECTION "S"

MOTION FOR SUPERSEDES

Southern Pacific Transportation Company, Defendant and Plaintiff in the various actions cited above all

consolidated for trial moves this court to stay the execution of a Judgment in favor of Harcon Barge Company, and against the defendant, Southern Pacific Transportation Comapny, pending the dispositioin of Southern Pacific appeal to the United States Court of Appeal for the Fifth Circuit, and for that purpose moves this court to fix the amount of the bond to be filed by the defendant, Southern Pacific Transportation Company.

/s/
LAWRENCE J. ERNST
J. WARREN GARDNER
CHRISTOVICH & KEARNEY
1900 American Bank Building
New Orleans, LA 70130
Phone: (504) 561-5700

ORDER

The Motion of the defendant, Southern Pacific Transportation Company for a stay pending its appeal to the United States Court of Appeals for the Fifth Circuit having been considered and it appearing to the court that the defendant is entitled to such stay:

It is ordered that the execution of and any proceedings to enforce the Judgment herein be stayed pending the outcome and determination of the appeal of the defendant, Southern Pacific Transportation Company, from such Judgment, upon filing by defendant, Southern Pacific Transportation Company and approval of this court of a Supercedes Bond in the sum of $32,000.00.

Opelousas, Louisiana, this 21 day of December, 1982.

/s/ JOHN M. SHAW
UNITED STATES DISTRICT JUDGE

CERTIFICATE

I hereby certify that a copy of the above and foregoing Motion For Supercedes has been mailed this day to E. Spiiivey Dault of the firm of Lake, Tindall, Hanger and Thackston, P. O. Box 918, Greenville, Mississippi, 38701; W. Gerald Gaudet of the firm of Voohries & Labbe, P. O. Box 3527, Lafayette, Louisiana, 70502; Clifford E. Laborde of the fiirm of Laborde & LaFargue, P. O. Box 2777, Marksville, Louisiana, 71351; Larry S. Craig, Civil Division, Torts Branch, U.S. Department of Justice, Washington, D.C. 20530; Robert McCleskey, Gelpi, Sullivan, Carroll & Laborde, 934 One Shall Square, New Orleans, Louisiana, 70139 and to Donald King of the firm of Jones, Walker, Waechter, Poitevent, Carrere & Denegree, 225 Baronne Street, New Orleans, Louisiana, 70112.

New Orleans, Louisiana, this 20th day of December, 1982.

/s/ Lawrence J. Ernst
LAWRENCE J. ERNST

APPENDIX C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

HARCON BARGE COMPANY, INC.	:	CIVIL ACTION
VS.	:	NO. 79-1592
D&G BOAT RENTALS, INC.	:	SECTION "S"

CONSOLIDATED WITH

SOUTHERN PACIFIC TRANSPORTATION CO.	:	CIVIL ACTION
VS.	:	NO. 791705
M/V ROLAND THOMAS, II, ET AL	:	SECTION "D"

CONSOLIDATED WITH

SOUTHERN PACIFIC TRANSPORTATION CO.	:	CIVIL ACTION
VS.	:	NO. 80-0511
M/V I. C. HOSKINS, ET AL	:	SECTION "S"

CONSOLIDATED WITH

SOUTHERN PACIFIC TRANSPORTATION CO.	:	CIVIL ACTION
VS.	:	NO. 80-0512
M/V IBERVILLE, ET AL	:	SECTION "S"

CONSOLIDATED WITH

SOUTHERN PACIFIC TRANSPORTATION CO.	:	CIVIL ACTION
VS.	:	NO. 80-0513
M/V CHARLES D, ET AL	:	SECTION "S"

CONSOLIDATED WITH

SOUTHERN PACIFIC TRANSPORTATION CO.	:	CIVIL ACTION
VS.	:	NO. 80-0514
M/V MARIAN HAGESTAD, ET AL	:	SECTION "S"

C-2

NOTICE OF MOTION TO AMEND JUDGMENT

TO: Lawrence J. Ernst
Christovich and Kearney
American Bank Building
New Orleans, Louisiana 70130
Attorney for Southern Pacific Transportation Company

PLEASE TAKE NOTICE THAT on the ____ day of _____, at ____ A.M. (or as soon thereafter as counsel can be heard), the undersigned will move this Court for an order to amend the Judgment in this action, absolving Tidewater Venice, Inc. and the M/V Iberville from all liability for costs in this matter subsequent to December 31, 1981, casting Southern Pacific Transportation Company with all costs in this matter subsequent to December 31, 1981.

This hearing shall be held at the United States Court House, Room 301, Federal Building, Opelousas, Louisiana at the aforementioned date and hour.

Lafayette, Louisiana, this 15 day of December, 1982.

LABORDE & LAFARGUE

BY: /s/ Cliffe E. Laborde

Southwest National Bank
Building Suite 702
102 Versailles Boulevard
Lafayette, Louisiana 70501
(318) 235-1891

C-3

MOTION TO AMEND JUDGMENT

NOW INTO COURT, through undersigned counsel, come TIDEWATER VENICE, INC. and the M/V IBERVILLE, and move the Court for an order amending the judgment rendered in this action on December 8, 1982 for the following reasons:

I.

The fourth paragraph of the judgment, as rendered, reads as follows:

> IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there be judgment herein in favor of plaintiff, Southern Pacific Transportation Company, and against M/V Iberville and Tidewater Venice, Inc., in the amount of TWO THOUSAND AND NO/100 ($2,000.00) DOLLARS, with 9.07% interest from April 25, 1979, until paid, and in favor of the United States of America, dismissing the third party demand of defendants, M/V Iberville and Tidewater Venice, Inc., against it, *defendants, M/V Iberville and Tidewater Venice, Inc. to bear costs.* (emphasis added)

Under the express working of the judgment, Tidewater Venice, Inc. and the M/V Iberville were cast with all costs in this matter.

III.

On December 29, 1981, however, Tidewater Venice, Inc., availing itself of the provisions of Rule 68 of the

Federal Rules of Civil Procedure, served a formal Offer of Judgment upon plaintiff, Southern Pacific Transportation Company, allowing plaintiff to have judgment taken against Tidewater Venice, Inc. in this cause in the amount of FOUR THOUSAND TWO HUNDRED FIFTY AND 00/100 ($4,250.00) DOLLARS, plus costs accured as of the date of the offer. A copy of that Offer of Judgment and its accompanying transmittal letter are attached hereto and made a part of this motion.

IV.

This Offer of Judgment was not accepted by plaintiff within ten days of service, and in fact, has never been accepted by plaintiff.

V.

The amount of the money judgment finally obtained by plaintiff against Tidewater Venice, Inc., was not more favorable than the amount of the Offer. Plaintiff, therefore, must pay all costs incurred subsequent to December 29, 1981, the date the Offer of Judgment was made.

VI.

Accordingly, Tidewater Venice, Inc. suggests that the fourth paragraph of the judgment rendered in this cause on December 8, 1982 be amended to read as follows:

> IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there be judgment herein in favor of plaintiff, Southern Pacific Transportation Company, and against M/V Iberville and Tidewater

Venice, Inc. in the amount of TWO THOUSAND AND NO/100 ($2,000.00) DOLLARS, with 9.07% interest from April 25, 1979, until paid, and in favor of the United States of America, dismissing the third party demand of defendants, M/V Iberville and Tidewater Venice, Inc., against it, defendants, M/V Iberville and Tidewater Venice, Inc. to bear costs from the date of judicial demand, April 2, 1980, until the date the Offer of Judgment was made, December 29, 1981, and plaintiff, Southern Pacific Transportation Company, to bear costs incurred subsequent to December 29, 1981.

WHEREFORE, Tidewater Venice, Inc. and the M/V Iberville pray that the Judgment in this cause rendered by the Court on Deceber 8, 1982 be amended as herein above set forth.

LABORDE & LAFARGUE

BY: /s/ Cliffe E. Laborde
Cliffe E. Laborde

C-6

Law offices
LABORDE & LAFARGUE
LABORDE BUILDING
MARKSVILLE, LOUISIANA
71351

December 29, 1981

Lawrence J. Ernst, Esq.
Christovich & Kearney
American Bank Building
New Orleans, LA 70130

RE: Harcon Barge Co., Inc. vs. D&G Boat Rentals, Inc., et al., No 79-1592, U.S.D.C., W.D., LA, Lafayette-Opelousas Division - CONSOLIDATED CASES

Dear Mr. Ernst:

Enclosed herewith is an Offer of Judgment under Rule 68 By and On Behalf of Tidewater Venice, Inc. which we submit to you for your consideration and acceptance on behalf of your client, Southern Pacific Transportation Company in connection with the captioned matter.

Thank you for your attention and we will look forward to hearing from you.

Sincerely,
LABORDE & LAFARGUE

BY: /s/ Cliffe E. Laborde
Cliffe E. Laborde

CEL3:ed
Enclosure
cc Donald L. King, Esq.
cc W. Gerald Gaudet, Esq.
cc Robert P. McClesky, Jr., Esq.
cc Larry S. Craig, Esq.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

HARCON BARGE COMPANY, INC.	:	CIVIL ACTION
VS.	:	NO. 79-1592
D&G BOAT RENTALS, INC.	:	SECTION "S"

CONSOLIDATED WITH

SOUTHERN PACIFIC TRANSPORTATION CO.	:	CIVIL ACTION
VS.	:	No. 79-1705
M/V ROLAND THOMAS, II, ET AL.	:	SECTION "D"

CONSOLIDATED WITH

SOUTHERN PACIFIC TRANSPORTATION CO.	:	CIVIL ACTION
VS.	:	NO. 80-0511
M/V I. C. HOSKINS, ET AL	:	SECTION "S"

CONSOLIDATED WITH

SOUTHERN PACIFIC TRANSPORTATION CO.	:	CIVIL ACTION
VS.	:	NO. 80-0512
M/V IBERVILLE, ET AL	:	SECTION "S"

CONSOLIDATED WITH

SOUTHERN PACIFIC TRANSPORTATION CO.	:	CIVIL ACTION
VS.	:	NO. 80-0513
M/V CHARLES D, ET AL	:	SECTION "S"

CONSOLIDATED WITH

SOUTHERN PACIFIC TRANSPORTATION CO.	:	CIVIL ACTION
VS.	:	NO. 80-0514
M/V MARIAN HAGESTAD, ET AL	:	SECTION "S"

C-8

OFFER OF JUDGMENT UNDER RULE 68 BY AND ON BEHALF OF TIDEWATER VENICE, INC.

TO: Southern Pacific Transportation Company

THROUGH: Lawrence J. Ernst, Esq.
Christovich & Kearney
American Bank Building
New Orleans, LA 70130

COMES NOW, through its undersigned counsel, Tidewater Venice, Inc., and pursuant to Rule 68 of the Federal Rules of Civil Procedure, offers to allow judgment to be taken against Tidewater Venice, Inc. by the plaintiff, Southern Pacific Transportation Company, in the amount of FOUR THOUSAND TWO HUNDRED FIFTY AND 00/100 ($4,250.00) DOLLARS, with costs now accrued which are allocable to Tidewater Venice, Inc.

Marksville, Louisiana, this 29th day of December, 1981.

LABORDE & LAFARGUE

BY: /s/ Cliffe E. Laborde
Attorneys For Tidewater Venice, Inc.

P. O. Box 277
Marksville, LA 71351
Tel. (318) 253-7521

CERTIFICATE

I HEREBY CERTIFY that a copy of the above and foregoing Offer of Judgment Under Rule 68 has been served upon all counsel of record, by placing same in the United States Mail, Properly addressed with sufficient postage affixed thereto.

Marksville, Louisiana, this 29th day of December, 1981.

/s/ Cliffe E. Laborde

C-10

MEMORANDUM IN SUPPORT OF MOTION TO AMEND JUDGMENT

The judgment rendered by the Court on December 8, 1982 cast defendants TIDEWATER VENICE, INC. and the M/V IBERVILLE with all costs associated with the claim by Southern Pacific Transportation Company against these defendants, third party claim against the U.S.A. At the time judgment was rendered, however, the Court was unaware of the fact that Tidewater Venice, Inc. had mde a formal Offer of Judgment to the plaintiff in advance of trial in the amount of FOUR THOUSAND TWO HUNDRED FIFTH AND 00/100 ($4,250.00) DOLLARS, plus costs then accrued.

This Offer of Judgment had been made to the plaintiff on December 29, 1981, pursuant to Rule 68 of the Federal Rules of Civil Procedure. The Offer was proper as to form, was in a definite amount, was served upon the plaintiff through its attorney of record by U.S. mail, and was never accepted.

The judgment rendered by the Court in favor of plaintiff and against Tidewater Venice, Inc. was in the amount of TWO THOUSAND AND 00/100 ($2,000.00) DOLLARS, plus interest and costs. Since the Offer was not accepted by plaintiff, and judgment ultimately obtained by the plaintiff was not more favorable than the amount so offered, defendant is not liable for any costs in this case incurred or accurred subsequent to December 29, 1981, the date of the Offer. *Nabors V. Texas Co.,* 32 F. Supp. 91 (D.C. LA. 1940); *Mr. Hanger, Inc. V. Cut Rate Plastic Hangers, Inc.,* 63 F.R.D. 607 (D.C. N.Y. 1974).

Therefore, defendants Tidewater Venice, Inc. and the M/V Iberville are entitled to an amendment of the Judgment in this case, casting plaintiff with all costs incurred and/or accrued subsequent to December 29, 1981, and so pray.

Respectfully Submitted:
LABORDE & LAFARGUE

BY: /s/ Cliffe E. Laborde

Cliffe E. Laborde
Southwest National Bank
Building Suite 702
Lafayette, LA 70501
(318) 235-1891

C-12

RULING ON MOTION

It appearing to the Court that on December 29, 1981, TIDEWATER VENIVE, INC., offered in writing to allow the plaintiff, SOUTHERN PACIFIC TRANSPORTATION COMPANY to take judgment against it for the sum of FOUR THOUSAND TWO HUNDRED FIFTH AND 00/100 ($4,250.00) DOLLARS, plus costs then accrued, which Offer was not accepted by the plaintiff, and the plaintiff not obtaining a more favorable judgment than was so offered;

NOW ON MOTION of Laborde & Lafargue, attorneys for Tidewater Venice, Inc.,

IT IS ADJUDGED that the plaintiff recover of the defendant the sum of TWO THOUSAND AND NO/100 ($2,000.00) DOLLARS, its damages so found, plus costs from April 2, 1980, the date of Judicial demand, to December 29, 1981, the date of defendant's Offer of Judgment, and that plaintiff, Southern Pacific Transportation Company, be cast for all costs incurred subsequent to December 29, 1981.

Opelousas, Louisiana, this ____ day of _____, 19____.

_____

U. S. DISTRICT JUDGE

CERTIFICATE

I hereby certify that copies of the foregoing Motion to Amend Judgment, Memorandum in Support Of Motion To Amend Judgment, Notice Of Motion To Amend Judgment and Ruling on Motion have been served upon all Counsel of Record by placing same in United States Mail, properly addressed, with sufficient postage affixed thereto.

Lafayette, Louisiana this 15th day of December 1982.

/s/ Cliffe E. Laborde
OF COUNSEL

APPENDIX D

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION
SECTION S

Filed Jan 25 1983

HARCON BARGE COMPANY, INC.
VS. CIVIL ACTION NUMBER
D&G BOAT RENTALS, INC. 791592

SOUTHERN PACIFIC TRANSPORTATION CO.
VS. CIVIL ACTION NUMBER
M/V I. C. HOSKINS, ET AL 800511

SOUTHERN PACIFIC TRANSPORTATION CO.
VS. CIVIL ACTION NUMBER
M/V IBERVILLE, ET AL 800512

SOUTHERN PACIFIC TRANSPORTATION CO.
VS. CIVIL ACTION NUMBER
M/V CHARLES D, ET AL 800513

SOUTHERN PACIFIC TRANSPORTATION CO.
VS. CIVIL ACTION NUMBER
M/V MARIAN HAGESTAD, ET AL 800514

AMENDED JUDGMENT

This cause came on for hearing on Tuesday, January 18, 1983, pursuant to regular assignment, on Motion by Tidewater Venice, Inc. and the M/V IBERVILLE to amend the original Judgment of this Court in these consolidated actions rendered and signed on December 8, 1982.

The Court, after hearing the law and the evidence presented, and in accordance with the findings of fact and conclusions of law which have hereto fore been filed herein, by reasons whereof, decrees as follows:

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment herein in favor of plaintiff, Harcon Barge Company, and against defendant, Southern Pacific Transportation Company, in the amount of TWENTY-ONE THOUSAND SIX HUNDRED TWENTY-NINE AND 68/100 ($21,629.68) DOLLARS, with 9.07% interest from April 9, 1979, until paid, Southern Pacific to bear costs.

It is further ORDERED, ADJUDGED AND DECREED that there be judgment herein in favor of defendants, M/V I. C. HOSKINS and the Arthur Smith Corporation, dismissing the claims of Southern Pacific Transportation Company against them, Southern Pacific to bear costs.

It is further ORDERED, ADJUDGED AND DECREED that there be judgment herein in favor of plaintiff, Southern Pacific Transportation, Company, and against M/V IBERVILLE and Tidewater Venice, Inc., in the amount of TWO THOUSAND AND NO/100 ($2,000.00) DOLLARS, with 9.07% interest from April 25, 1979, until paid, and in favor of the United States of America, dismissing the third party demand of defendants, M/V IBERVILLE and Tidewater Venice, Inc., against it, defendants, M/V IBERVILLE and Tidewater Venice, Inc. to bear costs from the date of judicial demand, April 2, 1980, until the date the Offer of Judgment was made, December 29, 1981, and plaintiff, Southern Pacific Transportation Company, to bear costs incurred subsequent to December 29, 1981.

It is further ORDERED, ADJUDGED AND DECREED that there be judgment herein in favor of plaintiff, Southern Pacific Transportation Company, and against M/V CHARLES D and D&G Boat Rentals in the amount of FORTY THOUSAND AND NO/100 ($40,000.00) DOLLARS, with 9.07% interest from April 7, 1979, until paid, defendants M/V CHARLES D and D&G Boat Rentals, to bear costs.

It is further ORDERED, ADJUDGED AND DECREED that there be judgment herein in favor of plaintiff, Southern Pacific Transportation Company, and against M/V MARIAN HAGESTAD and Canal Barge Company, in the amount of EIGHT HUNDRED AND NO/100 ($800.00) DOLLARS, with 9.07% interest from May 3, 1979, until paid, defendants, M/V MARIAN HAGESTAD and Canal Barge Company to bear costs.

Opelousas, Louisiana, this 25th day of January, 1983.

/s/ John M. Shaw

JOHN M. SHAW
UNITED STATES DISTRICT JUDGE

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 82-4584

Filed Jun 22 1983

HARCON BARGE COMPANY, INC.
versus — Plaintiff Appellee,
D&G BOAT RENTALS, INC.
Defendant Third-Party
and — Plaintiff-Appellant,
M/V CHARLES D,
versus — Defendant-Appellee
SOUTHERN PACIFIC — Cross-Appellant,
TRANSPORTATION,
Third-Party Defendant
Appellant, Cross-Appellee

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SOUTHERN PACIFIC TRANSPORTATION CO.
versus — Plaintiff-Appellant
M/V I. C. HOSKINS, Her Engines,
Boilers, Tackle, etc., in rem,
Defendant-Appellee.

****

SOUTHERN PACIFIC TRANSPORTATION CO.
versus — Plaintiff-Appellant
M/V IBERVILLE, Her Engines,
Boilers, Tackle, etc., in rem,
Defendant-Appellee.

****

SOUTHERN PACIFIC TRANSPORTATION CO.
versus Plaintiff-Appellant
Cross-Appellee

M/V CHARLES D, Her Engines,
Boilers, Tackle, etc., in rem,
and D&G BOAT RENTALS, INC.,
Defendant-Appellees
Cross-Appellants.

****

SOUTHERN PACIFIC TRANSPORTATION CO.
versus Plaintiff-Appellant,
Cross-Appellee

M/V MARIAN HAAGESTAD, ET AL.,
Defendants-Appellees
Cross-Appellants.

NO. 82-4584

Appeals from the United States District Court for the Western District of Louisiana

Before CLARK, Chief Judge, POLITZ and HIGGINBOTHAM, Circuit Judges.

BY THE COURT:

IT IS ORDERED that the motions of the parties to dismiss the appeal of Southern Pacific Transportation Company are **DENIED**

IT IS FURTHER ORDERED that the motions of Tidewater Venice, Inc. and Harcon Barge, Co., Inc. for stay of further proceedings pending disposition of motion to dismiss are **DENIED**

APPENDIX F

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 82-4584

Filed Oct 14 1983

HARCON BARGE COMPANY, INC.
versus — Plaintiff Appellee,
D&G BOAT RENTALS, INC.
Defendant Third-Party
and — Plaintiff-Appellant,
M/V CHARLES D,
versus — Defendant-Appellee
Cross-Appellant,

SOUTHERN PACIFIC
TRANSPORTATION,
Third-Party Defendant
Appellant, Cross-Appellee

****

SOUTHERN PACIFIC TRANSPORTATION CO.
versus — Plaintiff-Appellant
M/V I. C. HOSKINS, Her Engines,
Boilers, Tackle, etc., in rem,
Defendant-Appellee.

****

SOUTHERN PACIFIC TRANSPORTATION CO.
versus — Plaintiff-Appellant
M/V IBERVILLE, Her Engines,
Boilers, Tackle, etc., in rem,
Defendant-Appellee.

****

SOUTHERN PACIFIC TRANSPORTATION CO.
versus Plaintiff-Appellant
Cross-Appellee

M/V CHARLES D, Her Engines,
Boilers, Tackle, etc., in rem,
and D&G BOAT RENTALS, INC.,
Defendant-Appellees
Cross-Appellants.

****

SOUTHERN PACIFIC TRANSPORTATION CO.
versus Plaintiff-Appellant,
Cross-Appellee

M/V MARIAN HAAGESTAD, ET AL.,
Defendants-Appellees
Cross-Appellants.

F-3

NO. 82-4584

Appeals from the United States District Court for the Western District of Louisiana

Before CLARK, Chief Judge, POLITZ and HIGGINBOTHAM, Circuit Judges.

BY THE COURT:

IT IS ORDERED that the motions of the parties for reconsideration of the Court's order of June 22, 1983, to dismiss the appeals of Southern Pacific Transportation Company are **DENIED**

APPENDIX G

HARCON BARGE CO., INC.,
Plaintiff-Appellee,

v.

D&G BOAT RENTALS, INC.
Defendant Third-Party
Plaintiff-Appellant.

and

M/V CHARLES D.
Defendant-Appellee
Cross-Appellant,

v.

SOUTHERN PACIFIC TRANSPORTATION CO.,
Third-Party Defendant
Appellant-Cross-Appellee.

SOUTHERN PACIFIC TRANSPORTATION CO.,
Plaintiff-Appellant,

v.

M/V I.C. HOSKINS, Her Engines,
Boilers, Tackle, Etc., In Rem,
Defendant-Appellee.

SOUTHERN PACIFIC TRANSPORTATION CO.,
Plaintiff-Appellant,

v.

M/V IBERVILLE, Her Engines, Boilers,
Tackle, Etc., In Rem, et al.,
Defendants-Appellees.

SOUTHERN PACIFIC TRANSPORTATION CO.,
Plaintiff-Appellant
Cross-Appellee,

v.

M/V CHARLES D. Her Engines, Boilers, Tackle, Etc., In Rem, and D & G Boat Rentals, Inc.,
Defendants-Appellees
Cross-Appellants.

SOUTHERN PACIFIC TRANSPORTATION CO.,
Plaintiff-Appellant
Cross-Appellee,

v.

M/V MARION HAGESTAD, et at.,
Defendants-Appellees
Cross-Appellants.

No. 82-4584.

Appeals from the United States District Court for the Western District of Louisiana.

Before RUBIN, REAVLEY, and TATE, Circuit Judges.

TATE, Circuit Judge:

This appeal, by a single notice of appeal, is from a single judgment in five suits that were consolidated for trial under Fed.R.Civ.P. 42(a). On the same day the notice of appeal was timely filed, the opposing parties in one of the five consolidated actions filed a timely motion to amend the judgment. Subsequently, pursuant therteto, an amended judgment was entered. No further notice of appeal was filed.

Under Fed.R.App. 4(a)(4), the effect of this filing of a motion to amend the judgment was that "the time for appeal for all parties shall run from the entry of an order"disposing of this motion. The rule further provides: "A notice of appeal filed before the disposition.... shall have no effect." In *Griggs v. Provident Consumer Discount Company,* 459 U. S. 56, 103 S.Ct. 400, 74 L.Ed.2d 225 (1982), the Supreme Court has held that a court of appeal has no power or discretion to waive the defect of prematurity of a notice of appeal filed before entry of the order disposing of such a motion. The Court further held that such a premature notice of appeal is a "nullity", and "it is as if no notice of appeal were filed at all. And if no notice of appeal is filed at all, the Court of Appeals lacks jurisdiction to act." 459 U.S. at 61, 103 S.Ct. at 403.

[1] The harsh result of this mandated rigid application of this seemingly functionless provision of the rule is, in our view, that we must dismiss this appeal. Under *Griggs,* the timely filed motion to amend the judgment nullified the prior notice of appeal, and no notice of appeal was filed after the order was entered that granted the motion and amended the original judgment in a slight respect. We therefore lack jurisdiction to hear this appeal and must dismiss it.

Nevertheless, we must admit that our determination to this effect, required we believe by *Griggs,* is made complicated by the circumstance that the motion to amend was filed by the defendant's in only one of the five consolidated cases and, arguably, should have affected the appellate delays in that case only. Ultimately, however, we feel unable to evade the rigorous application Fed. R.App.P. 4(a)(4) mandated by *Griggs* because (as will be explained

below), the districts courts, all parties, and the district clerk treated the five consolidated actions as a single, combined suit—requiring but one judgment for all combined actions, and but one notice of appeal by any one party to all or any of the combined suits. Thus, under Rule 4(a)(4) the motion to amend this single judgment had the effect of not commencing the delay within which to notice on an appeal "for all parties" until entry of the order disposing of the motion, which thus required a new notice of appeal in order to confer appellate jurisdiction upon this court.

"Entry" of Judgment

Before setting forth in detail the facts of the present case, we deem it advisable to clarify what is meant by the date of "entry" of judgment, for purposes of determining the timeliness of a notice of appeal or of a motion to remand or alter a judgment, and how such entry is noted in the dockets of the district courts of the Fifth Circuit.

[2] In their initial arguments to this court, reflecting a not uncommon confusion in this regard, all counsel argued timeliness on the basis that the appellate and post-judgment motion delays commenced with the notice of the *filing* on December 8, 1982 of the single judgment that disposed of the five consolidated suits. This judgment was filed in the Deputy Clerk's office in Opelousas, La., for the Opelousas-Lafayette Division (where the case was tried) of the United States District Court, Western District of Louisiana. Instead, however, timeliness is measured from the date of *entry* of the judgment on the docket sheet of the case in the Clerk of District Court's records at Shreveport, in this case, December 14, 1982 (i.e., six days after the judgment was filed in Opelousas and mailed from there to Shreveport).

In the instant case, whether timeliness is governed

by the date of filing (December 8) or of entry (December 14) of the judgment, the timely served (December 15) and filed (December 21) motion to amend had as its consequence, in either event (*see* Part III *infra*), the draconian effect under Rule 4(a)(4) of nullifying the otherwise-timely prior notice of appeal filed December 21 and , in the absence of a new notice, of depriving us of appellate jurisdiction. Nevertheless, because of some general confusion as to the matter, we deem it appropriate for the benifit of the bar to describe the governing principles, as well as the practice among the clerks of the district courts of the Fifth Circuit, with regard to the entry of a judgment or order.

The basic issue of timeliness in this regard concerns provisions of Fed.R.App.P.4, as well as their relationship to Fed.R.Civ.P.79. FRAP Rule 4(a)(1) provides that in a civil case the notice of appeal "shall be filed with the clerk of the district court within 30 days after the date of *entry* of the judgment." (Emphasis added.) However, if a timely post-judgment motion is filed under Fed.R.Civ.P. 50(b) (for judgment notwithstanding the verdict), 52(b) (to amend or make additional findings of fact) or 59 (for a new trial, or to alter or amend the judgment), then "the time for appeal for all parties shall run from the *entry* of an order denying a new trial or granting or denying any other such motion." Fed.R.App.P. 4(a)(4) (emphasis added). Fed.R.Civ.P. 59(b), (e), provides that a motion for a new trial or to alter or amend a judgment "shall be served not later than 10 days after the *entry* of the judgment." (Emphasis added).

With regard to what is an "entry" of an order or judgment, Fed.R.Civ.P. 79(a) povides that the clerk of district court will maintain a "civil docket" book in which the file number of the civil action "shall be noted on the folio of the docket whereon the first entry of the action is made," and that "[a]ll papers filed with the clerk, all process issued and returns made thereon, all appearances,

orders, verdicts, and judgments shall be entered chronologically in the civil docket on the folio assigned to the action. "The rule specifically provides that "[t]he entry of an order or judgment shall show the date the entry is made." *Id.*

[3,4] The uniform practice of the clerks of the district courts of the Fifth Circuit is to signify the date of entry of an order or judgment under Rule 79(a), as follows: The date the judgment is *filed* is placed in the left-hand column of the case's docket sheet, followed by the description of the order or judgment in the right-hand column captioned for that purpose. If the judgment or order is entered at a later date than the date of filing, *then* such date of entry is added as a concluding note of the description of the judgment (which is in the righthand column), by adding "Dkt", "DK'T", or "Dkt'd" (i.e., "docketed"), followed by the date of such entry.[1]

Overview of the Principal Procedural Facts and Issue

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[1] We have so informed couselves through inquiry with the clerk of this court and with various clerks of the district courts. We earlier notified the parties of our intention to take judicial notice of this practice. No party disputes the accuracy of our description of the uniform practice of the district court clerks. We do not need to plumb the uncertain distinctions between judicial notice of "legislative facts", not governed by Fed.R.Evid. 201, and judicial notice of "adjudicative facts", governed by such rule. *See* Advisory Committee's note to Rule 201; 21 Wright & Graham, Federal Practice and Procedure, § 5103 (1977. In either event, we may take judicial notice of this practice as a fact that is "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.", Fed.R.Evid. 201(b)(2), as to which we have afforded the parties "an opportunity to be heard", Fed.R.Evid. 201(c), should it indeed be an "adjudicative" fact.

Southern Pacific, the appellant. does complain that it had no reason to understand what the abbreviation for "docketed" meant. It does not complain that it was in anyway misled or prejudiced by reliance upon the allegedly abbreviation. *See also* part I *infra.*

A single judgment was filed on December 8, 1982 and entered on the docket sheet in the clerk's office on December 14, 1982, which disposed of all claims that had been asserted in five suits that had been consolidated for trial. A party (Southern Pacific) to all five consolidated suits timely filed a single notice of appeal as to this judgment on December 21, 1982, by which it contests the awards made by the judgment as to each of the claims advanced by each of the five consolidated suits. On the same day, the defendants (M/V Iberville and Tidewater) in one of the consolidated suits filed a motion to amend the judgment with regard to its imposition of such upon them. The motion was granted and an amended judgment was entered on January 31, 1983. No further notice of appeal was filed by any party.

[5,6] The defendants have filed a motion to dismiss the appeal because no new notice of appeal was filed after the amended judgment.[2] Under Fed.R.App. 4(a)(4) and

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[2] After the record of this appeal was lodged in this court, the opposing parties in May 1983 filed a motion to dismiss Southern Pacific's appeal on the ground we now uphold. This motion was "denied" summarily without explanation by a motions panel on June 22, 1983, and the opponents' motion for reconsideration of the denial was likewise "denied", without explanation, on October 14, 1983. Southern Pacific suggests that, in view of these earlier rulings by the motions panel, "it seems unnecessary and repetitive to reexamine the same issues." Supplemental Memorandum, September 12, 1984, p.3.

This suggestion overlooks that "the requirement of a timely notice of appeal is 'mandatory and jurisdictional' ", *Griggs v. Provident Consumer Discount Company*, 459 U.S. 56, 61, 103 S.Ct. 400, 403 74 L.Ed.2d 225 (1982), and that we would be required to notice our lack of appellate jurisdiction even if no motion to dismiss had been filed. Southern Pacific also overlooks the settled jurisprudence of this court that an interlocutory denial of a motion to dismiss an appeal may always be reconsidered and granted if subsequently found to be meritorious. As we recently stated, with full footnote citation of our jurisprudence, in *Equal Employment Opportunity Commission v. Neches Butane Products Company*, 704 F.2d 144, 147 (5th Cir. 1983):

Griggs, supra, the original notice of appeal was a nullity, and we thus have no appellate jurisdiction—at least, if we regard the single judgment in the five consolidated suits as the only judgment that is the subject of this appeal.

However, if we regard the five suits as consolidated for "trial" (only) and hence regard this judgment, although in a single document and filed only in the principal of the five consolidated suits, as actually five judgments—one for each of the five consolidated suits—then, the motion to amend filed by the defendants in only one of the five suits that had been consolidated for trial, arguably, affected the appellate delays as to that suit only. The appelant Southern Pacific now so contends, and we regard this contention as the principal issue of this appeal.

I.

In this part I of the opinion, we will at somewhat tedious length we fear, set forth the procedural history and stance of this litigation. We have found no appellate decision that describes the mechanics of consolidation as practiced in the district courts and, from inquiry with our clerk's office, have found that the procedure utilized in the present case, leading to a single judgment disposing of all

(footnote 2 continued)

In this circuit, as many others, a preliminary motion to dismiss for want of jurisdiction is submitted to a motions panel for disposition, often without opinion. See United States Court of Appeals for the Fifth Circuit, Internal Operating Procedures, § 4(e) (1981); *United States v. Bear Marine Services*, 696 F.2d 1117, 1119 & n. 4 (5th Cir. 1983). A denial by a motions panel of a motion to dismiss for want of jurisdiction, however, is only provisional. With the benefit of full briefing and (as was the case here) oral argument, the panel to which the case falls for disposition on the merits may conclude that the motions decision was improvident and should be reconsidered.

of the consolidated cases, is followed in the preponderant number of consolidated cases appealed to this court. Then, in part II, we will set forth the dispositive legal principals applicable on this record to the issues before us.

The litigation before us arises out of a series of four collisions by ships over a two-month period with a structure pertaining to a railroad bridge over the Atchafalaya River in Berwick, Louisiana. The five suits, which resulted in the judgment now appealed from, included four suits by the owner of the bridge (Southern Pacific) against, respectively, the four vessels involved in the collisions, and the fifth by the owner (Harcon Barge) of a vessel for damages, which impleaded Southern Pacific as a third-party defendant (based upon Southern Pacific's allegedly negligent design and maintenance of the bridge structure). This appeal is from a district court judgment that awarded damages sought by four of these five suits that had by order of the district court previously been consolidated for trial.[3]

The consolidation and its record effects occurred as follows:

On March 30, 1981, Southern Pacific (as plaintiff in four of the suits and third-party defendant in the fifth) moved for transfer of all the cases (and of one not before us on appeal, *see* note 3) and their consolidation with

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[3] These five actions, with their civil-action docket numbers of the Western District of Louisiana, are: *Harcon Barge Co. v. D & G Boat Rentals,* No. 79-1592; *Southern Pacific v. M/V I.V. Hoskins,* No. 80-0511; *Southern Pacific v. M/V Iberville,* No. 80-0512; *Southern Pacific v. M/V Charles D,* 80-0513; and *Southern Pacific v. M/V Marian Hagestad,* No. 80-0514, Initially sonsolidated with these suits was a sixth action (Southen Pacific v. M/V Roland Thomas, No. 79-1705, which was compromised and dismissed before trial, and is not before us on this appeal.

No. 79-1592 (Harcon Barge; which was the lowest docket number). Over the opposition of some of the other parties, this motion was granted by the district court on April 21, 1981. The order described Southern Pacific's motion as requesting consolidation "for purposes of trial", although the granted motion had simply requested consolidation. As will be seen, subsequent to this order consolidating the five cases, they were thereafter considered and treated by the district court, all parties, and the district clerk of court as if consolidated into a single proceeding for purposes of both trial and judgment.

Thereafter, the docket sheet in 79-1592 (Harcon Barge) was treated as if it were the docket sheet for all the consolidated cases, with exceptions not here relevant. Following the order of consolidation, on the docket sheet of each of the consolidated cases a notation was entered of the granting of this motion for consolidation, and on the heading sheet of each of the consolidated cases was noted that the case was consolidated with the other five cases. In addition, for each of the consolidated cases other than 79-1592 (Harcon Barge, the principal case), an entry on the case's docket sheet was made, immediately following the notation that the motion to consolidate was granted: "*See* 791592 [*i.e.,* Harcon Barge v. D. & G. Boat Rentals] *for all future entries* except those pertaining only to [docket number of the particular action of the consolidated cases]." (emphasis added.) In each of the four cases on appeal that were consolidated with 79-1592 (Harcon Barge), the final entry was "12-8-82. SEE 791592 (Judgment closing case)." The entries in the other consolidated cases did not include (as docketed in 79-1592, Harcon Barge) the notation of the date the judgment had been entered (docketed) in 79-1592, nor did they include docket entries as to the filing of the motion to amend the judgment by the defendants in one of the consolidated cases, nor of the notices of appeal and cross-appeal, or of the entry of the amended judgment.

After the order consolidating the cases, all of the parties filed all relevant pleadings captioned by all five case-titles and docket numbers, whether or not the pleading or filing was addressed to a claim initially asserted by only one of the now-consolidated suits.

The district court decided the consolidated suits by a single judgment, filed December 8, 1982, which was captioned with the titles and district court docket numbers of all of the five consolidated suits. The judgment, attached in full as an appendix to this opinion, disposed of each of the claims of each of the parties in separate paragraphs, as if asserted in a single action, without differentiation by docket number of the suits as originally filed before consolidation. See Appendix. This judgment was filed only in the record of 79-1592 (Harcon Barge), the principal action. (However, as earlier stated, a note was placed on the docket sheet of each of the other consolidated suits referring in each to the judgment filed in 79-1592 (Harcon Barge), the principal case, as closing the case. No further entry was made following this notation on the docket sheets of these other consolidated cases.)

After entry of the judgment of December 8, 1982, entries as to subsequent filings were made only in 75-1592 (Harcon Barge; the principal case). These include the motion to amend, notice of appeal, notices of cross-appeal, cost motions, the supersedeas bond, etc. Relevant to present issues, these docket entries, found only in 79-1592 (Harcon Barge), are:

Date	Proceedings
12-8-82	JUDGMENT in favor of Pltf. .... [summary of provisions of judgment, *see* Appendix, omitted] (JMS/pm) NOE/mb

G-12

DKT-D 12-14-82[4]

12-21-82	MOTION (Tidewater Venice and M/V Iberville) to Amend Judgment, ref. to JMS (pm).
12-21-82	NOT OF APPEAL (Southern Pacific Transportation Company from12/8/82 Judgment ... [notation that notice of entry sent to other parties and the judge is omitted].)
1-25-83	AMENDED JUDGMENT in favor of Pltf. ... [summary of provisions omitted] (JMS/pm) NOE/mb DKT-D 1-31-83.

[7] As earlier noted, the defendants (M/V Iberville and Tidewater) in one of the suits (No. 80-0512), after the judgment, filed[5] on December 21, 1982 a "Motion to

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[4] For those interested in esoteric information, the following is the meaning of the concluding abbreviations:

"(JMS/pm)":	The judgment signed by District Judge John M. Shaw was filed by Pam Martinez (pm), a deputy clerk in the clerk's office in Shreveport.
"NOE/mb":	Notice of "Entry" of the judgment (NOE) was given to all parties by Deputy Clerk Mildred Baker (mb) of the Opelousas Division Office.
"DKT'D 12-14-82"	This is the date the judgment was actually entered on the docket sheet of the case on the record in the Shreveport office of the Clerk of the District Court. *See* part I, *supra*.

[5] Fed.R.App.P. 4(a)(4) provides that, if a "*timely* motion" to, inter alia, alter or amend the judgment under Fed.R.Civ.P. 59 is filed, then the time for appeal does not run until entry of the order granting or denying such motion. Here, the motion was filed on December 21, within ten days of the entry of the judgment on December 19, As is explained *infra*, slip op, at 770 ___F.2d at___the timeliness of the motion is actually determined by the date it is served (here, December 15 one day after entry of judgment), not by the date it is filed.

Amend Judgment" with regard to "[t]he fourth paragraph of *the* judgment, as rendered" (emphasis added), which paragraph had required these defendants "to bear costs". See Appendix. These defendants pointed out that they had made an offer of judgment in an amount more than the sum awarded by the judgment, so that under provisions of Fed.R.Civ.P. 68 they were entitled to be exonerated from costs incurred subsequent to the date of this offer of judgment of December 29, 1981. On January 25, 1983, the district court filed an "Amended Judgment", which repeated all awards made by the earlier judgment, except to exonerate these particlar defendants from costs subsequent to December 29, 1981, and to impose them on Southern Pacific instead. This motion and the proceedings leading to the amended judgment, as well as the docket entries, were filed only in the record of 79-1592 (Harcon Barge), the principal case.[6]

On December 21, 1982, as noted, Southern Pacific filed a single notice of appeal, likewise captioned with the titles and district court docket numbers of all of the five consolidated suits, which notice "appeals all of the actions ... consolidated for trial at a single time", from "*the* Final Judgment entered in said actions on the 8th day of December, 1982"(emphasis added). Southern Pacific paid only a single filing fee, viewing its single appeal as questioning all awards made in the single judgment disposing of the claims asserted by all of the consolidated suit.[7] The

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[6] They were not filed or noted, for instance, in the record of 80-0512 (M/V Iberville and Tidewater), the defendants in which suit had filed the motion to amend the judgment that disposed of all issues raised in the five consolidated suits.

[7] Southern Pacific complains of the insufficiency or denial of damages in the four suits in which it was plaintiff, and from the award of damages against it in the fifth suit (Harcon Barge, No. 79-1592), in which it was held to be partially negligent and liable for ten percent of that plaintiff's (Harcon's) total damages.

defendants in two of the consolidated suits[8] likewise filed notices of cross-appeal "from the final judgment entered in this action on the 8th day of December, 1982", likewise captioned in their cross-appeals with the titles and district court docket numbers of each of the five consolidated suits. (Following entry of the amended judgment on January 31, 1983 no party filed any notice of appeal or cross-appeal.)

II.

As will be seen from this recitation of the procedural facts, following the order of consolidation, the five cases were regarded as consolidated into a single proceeding for purposes of both trial and judgment by the district court, by all counsel, and by the district clerk of court. All parties accepted that the claims asserted by the now-consolidated suits were properly decided by a single judgment, as to which any party aggrieved by any portion of the judgnent (such as, in Southern Pacific's case, the awards made as to all of the claims initially aserted by each of the five consolidated suits) could perfect his appeal by a single notice of appeal and a single appellate filing fee (rather than, for instance, five filing fees for Southern Pacific's appeal from awards made for claims initially asserted separately by each of the five consolidated suits). Southern Pacific did not, for instance, question this construction of the record in its opposition to the initial motion to dismiss (*see* note 2

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8 By their cross-appeals, the defendants in No. 80-0514 (*Southern Pacific v. M/V Marian Hagested*) and No. 80-0513 (*Southern Pacific v. M/V Charles D*), appeal from the award of damages against them). We will not discuss further these cross-appeals. They are a nullity, as filed before entry of the amended judgment that finally disposed of the consolidated litigation, for the same reasons that Southern Pacific's notice of appeal was ineffective to confer appellate jurisdiction upon us.

supra)[9], and in its initial brief as appellant in this court Southern Pacific describes (p. 17) its appeal to this court as follows: "On December 15, 1982, Southern Pacific appealed the entire judgment of the trial court."

Not until after oral argument, and after this panel had requested supplementary briefing on the issues we now find require dismissal of this appeal, did Southern Pacific advance its present argument that the motion to amend the judgment by two of the party-defendants held liable within it, somehow, made Southern Pacific's notice of appeal premature under Fed.R.App.P. 4(a)(4) only against those defendants.

We find no statutory support for this contention.

The cases were consolidated by the district court *as sought by Southern Pacific* and authorized by Fed.R.Civ.P. 42(a).[10] This rule authorizes the district court to "order all actions consolidated", when they involve "a common question of law or fact". *Id.* It also authorizes the district court to "make such orders concerning proceedings therein as may tend to avoid unnecessary cost or delay." *Id.*

[8] In our view, Rule 42(a) authorized the district court to consolidate the cases both for trial and for disposition by a single judgment, especially when (as here)

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9 Its then sole contention will be discussed in part III *infra*.

10 Fed.R.Civ.P. 42(a) provides:

(a)*Consolidation.* When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial if any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

no objection was taken to the district court's effective ruling to this end. Further, the order of the district court granting consolidation was adequate authority for the district clerk of court to make, thereafter, docket entries only on the principal case, with notations in each of the other consolidated cases sufficient to inform the parties therein to look to the docket sheet of the cited lead case for future docket entries. Thus, the entries on the docket sheet in 79-1592 (Harcon Barge), the principal case, of the dates of entry of the judgment and amended judgment, and the filing of Tidewater's motion to amend and of the notices of appeal and cross-appeal, would be controlling not only for 79-1592 but also for the other four cases consolidate with it.

The governing principles with regard to consolidations under Rule 42(a) are summarized at 5 Moore's Federal Practice, ¶ 42.-02[3] at 42-27-29 (2d ed. 1984) (footnotes omitted):

> Subdivision (a) speaks both of joint hearings or trials and of consolidation. This wording should not serve to give renewed life to a mistaken notion that there is some inherent distinction between a joint hearing (or trial) of particular issues, and consolidation. The rule is worded as it is to reflect the prior practice to merge the hearing or trial of separate actions so for as is necessary for their expeditious handling. Thus, one or many or all of the phases of the several actions may be merged. But merger is never so complete even in consolidation as to deprive any party of any substantial rights which he may have possessed had the actions proceeded separately. The actions retain their separate identity, and the parties and pleadings in one action do not automatically become parties and pleadings in the other action.

See also, to generally similar but somewhat differing effect. 9 Wright & Miller, Federal Practice and Procedure, § 2382 (1971).

[9] The parties may not be consolidation, of course, be deprived of some substantive right available to them in an individual suit now consolidated. "The actions [do] not lose their separate identities for purposes of consolidation." *Alfred Dunhill of London v. Republic of China,* 425 U.S. 682, 735, 96 S.Ct. 1854, 1880, 48 L.Ed.2d 301 (1976). A substantive advantage sought by reason of the consolidation was rejected by *Dunhill,* the Court observing that the consolidated actions "were not merged; they were simply consolidated for trial in the interest of economy." *Id.,* 425 U.S. at 726, 96 S.Ct. at 1880. To similar effect, and for similar reasons to reject a substantive advantage sought by one party because of the consolidation, we ourselves have stated that "consolidation does cause one civil action to emerge from two; the actions do not lose their separate identity; the parties to one action do not become parties to the other. *McKenzie v. United States,* 678 F.2d 571, 574 (5th Cir. 1982).

But the issue here is not whether in a general sense separate civil actions remained after consolidation. The issue is whether, because of consolidation, and because of the terms of the judgment and the expectations of the parties and the district court, the district court entered but a single judgment that disposed of all the claims asserted in the consolidated suits, from which only one appeal need be taken by any party aggrieved by any or several of the claims decided, whether or not initially asserted in more than one of the consolidated suits.

The above cited principles were not offended by the district court's action in the present case, which (without objection by the parties) consolidated the cases for both

trial and single dispositive judgment of all claims, and by reason of which no party suffered substantive or procedural disadvantage by a procedure that decided all claims in one judgment rather than requiring a separate judgment for each of the five consolidated cases.

The district court, of course, could have maintained the separateness of the five suits except for the purpose of trial, but it did not do so. It could have required separate docket entries in each suit and rendered separate judgments in each suit, in which event requiring any party offended by any disposition to file a separate notice of appeal (and pay a separate appellate filing fee) as to each judgment as to which complaint was made; but it did not do so. We are unable to hold that the district court abused any discretion entrusted to it by Fed.R.Civ.P. 42(a) by the procedure it adopted, when consolidating the cases, so as "to avoid unnecessary costs or delay."

If Southern Pacific's contention at this late date were adopted—that, in effect, a judgment in a single document were regarded, instead, as five separate judgments—we would be faced, not only in this appeal but also in the numerous other consolidated cases similarly decided in the district courts throughout the circuit, with the issue as to whether individual notices of appeal were required as to each claim originally asserted separately in any one of the suits now decided by the consolidated judgment. In the present instance, for example, Southern Pacific filed only one notice of appeal and paid only one appellate filing fee, which notice is filed solely in the record of the principal suit (79-1592, Harcon Barge). Should its appeal be preserved only in this suit, but dismissed (for lack of a notice of appeal and a separate filing fee) as to the awards questioned by it that were based upon claims in the other four suits that were consolidated with 79-1592 for trial and judgment?

We are unable to find that the broad discretionary powers of the district court under Fed.R.Civ.P. 42(a) to consolidate suits and make appropriate orders to "avoid unnecessary costs or delay" is so rigidly limited, as Southern Pacific suggests, as to prohibit, where no substantive or procedural rights of any party are affected, the court to consolidate the cases both for trial and judgment, and to accomplish this efficiently and with minimal cost (and no prejudice to any party), as was done in the present consolidation of the five suits.

III.

[10] It is apparent from our statement of the procedural facts and from the record that Southern Pacific was not prejudiced by the consolidation procedures utilized herein, of which it was fully aware, except by its after-the-fact failure to recognize the draconian effect under Fed.R.App. 4(a)(4) that the filing of the motion to amend had the effect of nullifying its notice of appeal. It was fully aware that the motion was filed, did not contest its timeliness or its request for amendment, and was fully aware that an amended judgment was entered. The real cause of Southern Pacific's predicament is not any prejudice resulting from the consolidation procedures followed, but rather the unduly technical requirement of Rule 4(a)(4) that it file a new notice of appeal, and Southern Pacific's failure to do so after the amended judgment was entered.

The motion to amend was filed on December 21, 1982 by the defendants M/V Iberville and Tidewater. It prayed for the amendment of one paragraph of the judgment, which had assessed costs against these defendants, so as to

relieve these defendants of their imposition because of the their previous offer of judgment under Fed.R.Civ.P. 68. Without this amendment, subsequently granted, under the judgment these defendants would have been liable for such costs. The motion to amend was "[a] motion to amend or alter the judgment" under Fed.R.Civ.P. 59(e), which had the effect under Fed.App.P. Rule 4(a)(4) of nullifying any previous notice of appeal and, further, of commencing the delay within which to take an appeal only after this motion was disposed of.

When its deficiency in this regard was first called to Southern Pacific's attention by the motions to dismiss the appeal when initially filed in this court (*see* note 2 *supra*), Southern Pacific solely contended in its opposition that the amendment sought (and granted) was not a substantive change in the judgment and that, since the defendants were entitled as of right to the Rule 68 relief, requests for such relief could properly be made under Fed.R.Civ.P. 60, citing *Glick v. White Motor Co.*, 317 F.Supp. 42, 43 (E.D.Pa.1970) and similar cases. In *Glick*, the plaintiff had filed a motion to amend under Rule 59(e), praying that it be awarded pre-judgment interest to which it was entitled under state law in this diversity suit. The motion was untimely as a Rule 59(e) motion, however, because served more than ten days after entry of the judgment of which amendment was sought. The district court nevertheless granted the amendment prayed for, reasoning that the motion for amendment to which the mover was entitled as of right to relief could be characterized as a motion under Fed.R.Civ.P. 60(a) to correct a clerical mistake, which under this rule could be corrected at any time.

[13] The circumstance that relief sought by a timely

filed motion to amend under Rule 59(e) could also have been obtained under Rule 60(a) is not persuasive of the conclusion that a timely filed motion to amend or alter the judgment under Rule 59(e) must always be characterized as a non-59(e) motion. Nor does Southern Pacific cite any decision to this effect. With all its defects, one virtue of Fed.R.App.P. 4(a)(4) is its certainty in providing that an effective notice of appeal must be filed when certain specified motions, including a motion to amend or alter under Rule 59(e), are filed after the judgment is entered. This certainty would be eroded if we adopted Southern Pacific's contention that a motion to amend the judgment, which looks and reads like and *is* a Rule 59(e) motion, may nevertheless be disregarded as such for purposes of evading the harsh effects of Rule 4(a)(4), because the amendment relief might have been sought by some other post-judgment motion.

Before oral argument, Southern Pacific's initial position was that the delay to notice on appeal commenced when the judgment was filed on December 8, 1982 (*see* Part I *supra*), on which date notice of "entry" (filing) of the judgment was sent to all counsel by the deputy clerk at Opelousas (*see* note 4 *supra*). We were originally given some concern that, since initially all parties shared Southern Pacific's misconception that this date was the effective date of entry of the judgment, perhaps (although the issue was not raised below) under this construction of the record the present Rule 59(e) motion to amend the judgment was not a "*timely*" motion as required by Fed.R.App. 4(a)(4); in the absence of timeliness, the motion could not have the effect of nullifying an otherwise timely notice of appeal. However, even under that construction of the record by the parties initially, the Rule 59(e) motion to amend the judgment was timely served and filed under rule 4(a)(4) and would thus nullify Southern Pacific's otherwise timely prior notice of appeal.

The motion to amend by M/V Iberville and Tidewater was filed on December 21, 1982. To the motion was attached a certificate dated December 15, 1982, stating that on that date the motion and attachment had been served on all counsel in the consolidated cases by deposit in the United States mail, properly addressed and with sufficient postage.

Under Fed.R.Civ.P. 59(e), a motion to amend must be "served" not later than ten days after entry of judgment. Service of pleadings subsequent to the original complaint, with exceptions not here relevant, may be made upon an opposing attorney "by mailing it to him at his lasts known address.... Service by mail is complete upon mailing." Fed.R.Civ.P. 5(b). The filing thereafter of the motion must be made"within a reasonable time" after service. Fed.R.Civ. P. 5(d).

[12] Under these principles, Tidewater's Rule 59(e) motion to amend was "served" on December 15, 1982, a relevant date for its timeliness, not the date it was "filed" on December 21, 1982, as so held in *Allen v. Ault,* 564 F.2d 1198 (5th Cir.1977). The date of service of a motion to amend the judgment within the meaning of Rule 59(e) is the date upon which the moving party certifies, without contest by the non-moving parties, that the motion was mailed to opposing counsel. *Clayton v. Douglas,* 670 F.2d 143, 144 (10th Cir.), *cert. denied,* 457 U.S. 1109, 102 S.Ct. 2911, 73 L.ED.2d 1319 (1982); 11 Wright and Miller, Federal Practice and Procedure, §§ 2812 at 83 & n. 48, § 2817 at 109 & nn. 24-26 (1973).

Thus, even if (as earlier argued) the date of filing the judgment (December 8th) rather than the date of its entry

(December 14) were the determinative date, of Tidewater's motion to amend, served on December 15, would be considered timely served and thereafter filed on December 21, within a reasonable time after such service. And, of course, since actually the date of the judgment's entry on December 14 is the determinative date, the present motion to amend, which was *filed* on December 21 (i.e., within the ten-day delay after entry of judgment allowed for *service* of the motion, *prior* to its filing), is clearly timely.

Conclusion

We therefore find that we are without jurisdiction to hear this appeal or (*see* note 8 *supra* or the cross-appeals, because of the failure of any party to file a notice of appeal after the amended judgment was entered in this case on January 31, 1983. The appeal must therefore be DISMISSED, at the cost of Southern Pacific, the appellant.

APPEAL DISMISSED.

Appendix

The judgment filed in this consolidated case on December 8, 1982, is a follows:

Appendix—Continued
United States District Court

Western District of Louisiana

Lafayette-Opelousas Division

G-24

Section S

Filed Dec. 8, 1982

HARCON BARGE COMPANY, INC.

vs.

D & G BOAT RENTALS, INC.

Civil Action Number 79-1592

SOUTHERN PACIFIC
TRANSPORTATION CO.

vs.

M/V I.C. HOSKINS, ET AL.

Civil Action Number 800511

SOUTHERN PACIFIC
TRANSPORTATION CO.

vs.

M/V IBERVILLE, ET AL.

Civil Action Number 800512

SOUTHERN PACIFIC
TRANSPORTATION CO.

vs.

M/V CHARLES D, ET AL.

Civil Action Number 800513

SOUTHERN PACIFIC
TRANSPORTATION CO.

vs.

M/V MARIAN HAGESTAD, ET AL.

Civil Action Number 800514

JUDGMENT

These consolidated cases came on for trial before the Court, District Judge John M. Shaw presiding. After hearing the law and the evidence presented, and in accordance with the Findings of Fact and Conclusions of Law filed herewith,

It is ORDERED, ADJUDGED AND DECREED that there be judgment herein in favor of plaintiff, Harcon Barge Company, and against defendant, Southern Pacific Transportation Company, in the amount of $21,629.68, with 9.07% interest from April 9, 1979, until paid, Southern Pacific to bear costs.

It is further ORDERED, ADJUDGED AND DECREED that there be judgment herein in favor of defendants, M/V I.C. Hoskins and the Arthur Smith Corporation, dismissing the claims of Southern Pacific Transportation Company against them, Southern Pacific to bear costs.

It is further ORDERED, ADJUDGED AND DECREED that there be judgment herein in favor of plaintiff, Southern Pacific Transportation Company, and against M/V Iberville and Tidewater Venice, Inc., in the amount of TWO THOUSAND AND NO/100 ($2,000.00) DOLLARS, with 9.07% interest from April 25, 1979, until paid, and in favor of the United States of America, dismissing the third party demand of defendants M/V Iberville and Tidewater Venice, Inc., against it, defendants, M/V Iberville and Tidewater Venice, Inc., to bear costs.

It is further ORDERED, ADJUDGED AND DECREED that there be judgment herein in favor of plaintiff, Southern Pacific Transportation Company, and against M/V Charles D and D & G Boat Rentals in the amount of FORTY THOUSAND AND NO/100 ($40,000.00) DOLLARS, with 9.07% interest from April 7, 1979, until paid, defendants, M/V Charles D and D & G Boat Rentals, to bear costs.

It is further ORDERED, ADJUDGED AND DECREED that there be judgment herein in favor of plaintiff, Southern Pacific Transportation Company, and against M/V Marian Hagestad and Canal Barge Company, in the amount of EIGHT HUNDRED AND NO/100 ($800.00) DOLLARS, with 9.07% interest from May 3, 1979, until paid, defendants, M/V Marian Hagestad and Canal Barge Company to bear costs.

Opelousas, Louisiana, December 8, 1982.

/s/ John M. Shaw
JOHN M. SHAW
UNITED STATES
DISTRICT JUDGE
"COPY SENT
DATE 12-8
BY MB
TO Ernst
DavisonN
Gaudet
Gault
Laborde
Bookter
McCleskey
King".

APPENDIX H

HARCON BARGE CO., INC.,
Plaintiff-Appellee,

v.

D&G BOAT RENTALS, INC.
Defendant Third-Party
Plaintiff-Appellant.

and

M/V CHARLES D.
Defendant-Appellee
Cross-Appellant,

v.

SOUTHERN PACIFIC TRANSPORTATION CO.,
Third-Party Defendant
Appellant-Cross-Appellee.

SOUTHERN PACIFIC TRANSPORTATION CO.,
Plaintiff-Appellant,

v.

M/V I.C. HOSKINS, Her Engines,
Boilers, Tackle, Etc., In Rem,
Defendant-Appellee.

SOUTHERN PACIFIC TRANSPORTATION CO.,
Plaintiff-Appellant,

v.

M/V IBERVILLE, Her Engines, Boilers,
Tackle, Etc., In Rem, et al.,
Defendants-Appellees.

SOUTHERN PACIFIC TRANSPORTATION CO.,
Plaintiff-Appellant
Cross-Appellee,

v.

M/V CHARLES D, Her Engines, Boilers, Tackle, Etc., In Rem, and D & G Boat Rentals, Inc.,
Defendants-Appellees
Cross-Appellants.

SOUTHERN PACIFIC TRANSPORTATION CO.,
Plaintiff-Appellant
Cross-Appellee,

v.

M/V MARION HAGESTAD, et al.,
Defendants-Appellees
Cross-Appellants.

No. 82-4584.

United States Court of Appeals,
Fifth Circuit.

April 23, 1985.

Appeals from the United States District Court for the Western District of Louisiana.

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion November 12, 1984, 746 F.2d 278 (1984))

Before CLARK, Chief Judge, GEE, RUBIN, REAVLEY, POLITZ, TATE, JOHNSON, WILLIAMS, GARWOOD, JOLLY, HIGGINBOTHAM, DAVIS and HILL, Circuit Judges.*

BY THE COURT:

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* Judge Carolyn Dineen Randall is recused, and therefore did not participate in this decision.

A member of the court in active service having requested a poll on the application for rehearing en banc and a majority of the judges in active service having voted in favor of granting a rehearing en banc,

IT IS ORDERED that his case shall be reheard en banc by the court, without oral argument, on a date hereafter to be fixed, with regard to Part III of the opinion of the court. In all other respects, rehearing and rehearing en banc is DENIED.

IT IS FURTHER ORDERED that the rehearing en banc in this case shall be consolidated with the rehearing en banc granted in Case No. 83-3682—*Steve Willie v. Continental Oil Co., et al.* The clerk will specify a briefing schedule for the filing of supplemental briefs in both cases.

APPENDIX I

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

HARCON BARGE CO., INC.,
Plaintiff-Appellee,

v.

D&G BOAT RENTALS, INC.
Defendant Third-Party
Plaintiff-Appellant.

and

M/V CHARLES D,
Defendant-Appellee
Cross-Appellant,

v.

SOUTHERN PACIFIC
TRANSPORTATION CO.,
Third-Party Defendant
Appellant-Cross-Appellee.

SOUTHERN PACIFIC
TRANSPORTATION CO.,
Plaintiff-Appellant,

v.

M/V I.C. HOSKINS, Her Engines,
Boilers, Tackle, Etc., In Rem,
Defendant-Appellee.

No. 82-4584

OPINION

SOUTHERN PACIFIC TRANSPORTATION COMPANY,
Plaintiff-Appellant

v.

M/V IBERVILLE, Her Engines, Boilers, Tackle, Etc., In Rem, ET AL.,
Defendants-Appellees.

SOUTHERN PACIFIC TRANSPORTATION CO.,
Plaintiff-Appellant
Cross-Appellee,

v.

M/V CHARLES D, Her Engines, Boilers, Tackle, Etc., In Rem, and D & G Boat Rentals, Inc.,
Defendants-Appellees
Cross-Appellants.

SOUTHERN PACIFIC TRANSPORTATION CO.,
Plaintiff-Appellant
Cross-Appellee,

v.

M/V MARION HAGESTAD, ET AL.,
Defendants-Appellees
Cross-Appellants.

Filed March 12, 1986

Before: Clark, Chief Judge, Gee, Rubin, Reavley, Politz, Tate, Johnson, Williams, Garwood, Jolly, Higginbotham, Davis, Hill and Jones, Circuit Judges.*

Opinion by Judges Alvin B. Rubin and Albert Tate

Appeals from the United States District Court
for the Western District of Louisiana
John M. Shaw, District Judge, Presiding

SUMMARY

Courts and Procedure

Rehearing en banc to consider a panel decision dismissing an appeal for lack of jurisdiction after holding that a post-judgment motion to amend a judgment had the effect of nullifying a previously filed notice of appeal. Appeal dismissed.

A district court rendered a single judgment in five sonsolidated actions. On the same day that a notice of appeal was timely filed by one party, opposing parties filed a motion to amend the judgment to relieve the moving parties from liability for costs. The district court granted the motion and filed an amended judgment. No further notice of appeal was filed after the entry of the amended judgment. On appeal, a panel of this court held that the motion was one to alter or amend the judgment within the meaning of Fed.R.Civ.P. 59(e) and that it nullified the previously filed notice of appeal. The failure of the appellants to file a later notice of appeal meant that there was no valid notice of appeal. The panel therefore dismissed the appeal for lack of jurisdiction.

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*Judge Randall did not participate in this decision.

[1] Rule 59 of the Federal Rules of Civil Procedure requires that a motion to alter or amend a district court judgment must be served within ten days from the entry of judgment. Rule 4(a)(4) of the Federal Rules of Appellate Procedure provides that an appeal is premature if taken before the disposition of a timely-served motion under Rule 59. Rule 4 does not expressly apply to a motion filed under Rule 60(a) of the Federal Rules of Civil Procedure pursuant to which a motion may be filed in the district court to correct clerical mistakes at any time, or under 60(b) to seek relief from a judgment that is erroneous for other stated reasons, which may be filed within a reasonable time after entry of judgment. A motion filed under Rule 60 does not, therefore, nullify a prevoiusly filed notice of appeal. [2] Rule 4 was not intended to apply to motions to correct purely clerical errors, but it was intended to apply to all other timely motions to amend a judgment served within ten days of the judgment, even though some such motions might also be considered timely by the district court if filed at a later date. Accordingly, any post-judgment motion to alter or amend a judgment served within ten days after the entry of judgment, other than a motion to correct purely clerical errors covered by Rule 60(a), is within the unrestricted scope of Rule 59(e) and must, however designated by the movant, be considered as a Rule 59(e) motion for purposes of Fed.R.App.P. 4(a)(4). If. on the other hand, the motion asks for some relief other than correction of a purely clerical error and is served after the ten-day limit, then Rule 60(b) governs its timeliness and effect. A bright-line rule is essential to carry out the purpose of Rule 4(a)(4) and to avoid wasteful confusion over the status of a previously filed notice of appeal.

OPINION

ALVIN B. RUBIN and ALBERT TATE, Circuit Judges:

[1] Rule 59 of the Federal Rules of Civil Procedure requires that a motion to alter or amend a district court judgment must be served within ten days from the entry of judgment. Rule 4(a)(4) of the Federal Rules of Appellate Procedure provides than an appeal is premature if taken before the disposition of a timely-served motion to amend the district court's judgment, filed under Rule 59. Rule 4 does not apply in express terms to a motion filed under Rule 60(a) of the Federal Rules of Civil Procedure pursuant to which a motion may be filed in the district court to correct clerical mistakes at any time, or under Rule 60(b) to seek relief from a judgment that is erroneous for other stated reasons, which may be filed within a reasonable time after entry of judgment. A motion filed under Rule 60 does not, therefore, nullify a previously filed notice of appeal.

In determining whether this court has jurisdiction of an appeal, two of our panels have differed in their characterization of a post-judgment motion to amend the district court's judgment filed within ten days after entry of the judgment. In *Harcon Barge Co. v.D & G Boat Rentals, Inc.*,[1] the panel held that a post-judgment motion to amend (described as such by the moving parties who sought to avoid the taxing of costs against them), timely served within the ten-day limit in Fed. R. Civ. P. 59(e), was a Rule 59(e) motion and had the effect under Fed. R. App. P. 4(a)(4) of nullifying a previously filed notice of appeal.

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[1] 746 F.2d 278, 288-90 (5th Cir. 1984).

The panel concluded that it lacked jurisdiction and dismissed the appeal.[2] On the other hand, in *Willie v. Continental Oil Co.*[3] the panel characterized a motion to amend the judgment to conform to pretrial stipulations, served within the ten-day limit, not as a Rule 59(e) motion but as a Rule 60(b)(1) motion. The panel concluded that, under Fed. R. App. P. 4(a)(4), the notice of appeal filed before the motion to amend (which it characterized as filed under Rule 60(b)(1)) remained valid and divested the district court of jurisdiction. To resolve that conflict, this court ordered rehearing en banc in *Harcon Barge*, as to Part III of that opinion,[4] and in *Willie*.[5]

[2] If Fed. R. App. P. 4 did not apply to any Rule 60 motion, its effect would be drastically curtailed, for Rule 60(b)(6) permits the filing of a motion for "any other reason justifying relief from the operation of the judgment." We hold that Rule 4 was not intended to apply to motions to correct purely clerical errors, but it was intended to apply to all other timely motions to amend a judgment served within ten days of the judgment, even though some such motions might also be considered timely by the district court if filed at a later date. Accordingly, we hold that any post-judgment motion to alter or amend the judgment served within ten days after the entry of the judgment, other than a motion to correct purely clerical errors covered by Rule 60(a), is within the unrestricted scope of Rule 59(e) and must, however designated by the movant, be considered as a Rule 59(e) motion for purposes of Fed. R.

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2 *Id.* at 289-90.

3 746 F.2d 1041, 1044-45 (5th Cir. 1984).

4 760 F.2d 86 (5th Cir. 1985) (ordering rehearing en banc).

5 760 F.2d 87 (5th Cir. 1985) (ordering rehearing en banc).

App. P. 4(a)(4). If, on the other hand, the motion asks for some relief other than correction of a purely clerical error and is served after the ten-day limit, then Rule 60(b) governs its timeliness and effect. A bright-line rule is essential to carry out the very purpose of the 1979 amendment to Rule 4(a)(4) and to avoid wasteful confusion over the status of a previously filed notice of appeal.

I.

We detail only those facts necessary for this rehearing.[6] A single judgment was rendered in the five consolidated actions involved at trial. On the same day a notice of appeal was timely filed by one party, opposing parties filed, and then timely served, a "Motion to Amend Judgment" seeking to have the judgment amended to relieve the moving defendants from liability for costs. The basis for the costs motion was that these parties had made an offer of judgment in an amount greater than that actually awarded by the judgment and the contention that, under Fed. R. Civ. P. 68, they were entitiled to be relieved from bearing any costs incurred subsequent to their offer. The district court granted their motion and filed an amended judgment that exonerated the moving defendants from liability for the disputed costs. No further notice of appeal was filed after entry of the amended judgment. On appeal, a panel of this court held that the motion was one "to alter or amend the judgment" within the meaning of Fed. R. Civ. P. 59(e), and it nullified the previously filed notice of appeal. The failure of the appellants to file a later notice of appeal meant that there was no valid notice of appeal, and

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[6] For a fuller factual backgroung, refer to the panel opinion in *Harcon Barge*, 746 F.2d 278 (5th Cir. 1984).

this court lacked jurisdiction. The panel therefore dismissed the appeal.

II

Fed. R. App. P. 4(a)(4) specifies several post-judgment motions, including those under Fed. R. Civ. P. 59, which must be disposed of before an effective notice of appeal can be filed. The rule provides that the time for filing a notice of appeal shall run from the entry of the order denying a new trial or granting or denying any of the other motions listed in Rule 4(a)(4). In addition, the rule specifies that a notice of appeal filed before the disposition of any of the listed motions shall have no effect, and a new notice of appeal must be filed within the designated time after disposition of those motions through entry of an order. A party failing to file a new notice of appeal loses its right to appeal.

In *Griggs v. Provident Consumer Discount Co.*,[7] the Supreme Court held that a court of appeals cannot waive the defect of prematurity of a notice of appeal filed before the entry of an order disposing of one of the motions listed in Rule 4(a)(4). Such a premature notice of appeal is a "nullity," and "it is as if no notice of appeal were filed at all. And if no notice of appeal is filed at all, the Court of Appeals lacks jurisdiction to act."[8]

Despite the harsh effect of the *Griggs* jurisdictional rule, this interpretation of Rule 4(a)(4) provides a bright-line test signaling lawyers when a new notice of appeal is needed. This virtue, however, can be turned to vice if the courts of appeals do not complement the *Griggs* rule

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7 459 U.S. 56, 103 S.Ct. 400 (1982) (per curiam).

8 450 U.S. at 61, 103 S.Ct. at 403.

with an equally bright-line rule distinguishing between those motions considered to be within the rules listed in Rule 4(a)(4), and nullifying previously filed notices of appeal, and those motions considered to be filed under other rules not listed in Rule 4(a)(4) and thus devoid of an effect on appellate jurisdiction. The two rules involved in the *Harcon Barge* and *Willie* cases are Rules 59(e) and Rule 60.

A.

In the instant case, the moving defendants sought to amend the judgment of the district court as to the costs assessed to them. They styled their motion as one to amend or alter the judgment and they served it within ten days after the entry of the judgment. The motion sought relief available under Rule 59(e), did not seek merely to correct a clerical error in the judgment, and was served within that rule's time limits. Although the motion itself does not specify under which rule it was being brought, it nevertheless falls squarely within the province of Rule 59(e).

In *Willie,* the movants sought to change the court's judgment to reflect the terms of a pretrial stipulation regarding one of the parties' cross-claims. They styled their motion as a "Motion to Amend Judgment," but as in *Harcon Barge,* the motion itself did not state under which rule it was being brought. The *Willie* panel held that it was brought under Rule 60(b)(1), even though the motion was served within ten days after the entry of the disputed judgment.

It is patent that Rule 59(e) and Rule 60 provide overlapping relief.[9] Motions under Rule 59(e) must be filed

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[9] 11 Wright and Miller, Federal Practice and Procedure, § 2817 at 110-13 (1973).

and served within ten days, but those listed in Rule 60(a) and (b) may be filed at a later date. When the timeliness not of the motion itself but of a notice of appeal from the judgment is involved, a court is not, however, free to choose under which rule it prefers to consider the motion made. If a motion falls within the scope of Rule 59(e), and it is timely served within ten days after entry of judgment as that rule requires, then the court musts consider it as a Rule 59(e) motion for the purposes of Fed. R. App. P. 4(a)(4), regardless of how it is styled. The only qualification to this rule is that, even when made within the ten-day period, so important to Rule 59(e), a motion seeking to correct purely clerical errors and mistakes is a Rule 60(a) motion and therefore it does not void a previously filed notice of appeal under Fed. R. App. P. 4(a)(4).

The scope of Rule 60(a) is, as we have noted, very limited. In *Dura-Wood Treating Co., Division of Roy O. Martin Lumber Co. v. Century Forest Industries, Inc.*,[10] the court set out these limits:

> Rule 60(a) finds application where the record makes apparent that the court intended one thing but by merely clerical mistake or oversight did another. Such a mistake must not be one of judgment or even of misidentification, but merely of recitation, of the sort that a clerk or amanuensis might commit, mechanical in nature.... If of this sort, it matters not whether the magistrate committed it—as by mistakenly drafting his own judgment—or whether his clerk did so...the law does not regard such trifles. In such instances the judgment can be corrected to speak the truth. (Citations omitted).

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10 694 F.2d 112, 114 (5th Cir. 1982).

Thus, it is proper to use Rule 60(a) to correct a damages award that is incorrect because it is based on an erroneous mathematical computation, whether the error is made by the jury[11] or by the court.[12] "Errors of a more substantial nature are to be corrected by a motion under Rules 59(e) or 60(b).[13] Correction of an error of "substantive judgment," therefore, is outside the reach of Rule 60(a).[14]

Three other circuits have analyzed the separate roles of Rule 59(e), to alter and amend the judgment, and Rule 60(a), to correct the court's clerical mistakes. In *Miller v. Transamerican Press, Inc.*,[15] the Ninth Circuit held that a court derives its power to correct clerical errors, such as the failure to memorialize part of a decision, from Rule 60(a) and not Rule 59(e). The Tenth Circuit took a similar view in *St. Paul Fire & Marine Insurance Co. v. Continential Casualty Co.*,[16] holding the "[m]otions seeking mere technical changes in the form of a judgment are not Rule

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11 *United States ex rel. Mississippi Road Supply Co. v. H. R. Morgan, Inc.* 542 F.2d 262, 269 (5th Cir. 1976), *cert. denied*, 434 U.S. 828, 98 S.Ct. 106 (1977).

12 *Chavez v. Balesh*, 704 F.2d 774, 776-77 (5th Cir. 1983).

13 11 Wright and Miller, Federal Practice and Procedure,§ 2854 at 149 (1973).

14 *Jones v. Anderson-Tully Co.*, 722 F.2d 211, 212 (5th Cir. 1983); *Trahan v. First National Bank of Ruston*, 720 F.2d 832, 833-34 (5th Cir. 1983), *judgment of district court aff'd*, 747 F.2d 990 (5th Cir. 1984)(per curiam). *See also, In re Galiardi*, 745 F.2d 335, 337 (5th Cir. 1984); *Warner v. City of Bay St. Louis, 526 F.2d 1211, 1212 (5th Cir. 1976), judgment of district court aff'd* 552 F.2d 583 (5th Cir. 1977)(per curiam); *West Virginia Oil & Gas Co. v. George E. Breece Lumber Co.*, 213 F.2d 702, 705 (5th Cir. 1954).

15 709 F.2d 524, 527-28 (9th Cir. 1983).

16 684 F.2d 691, 693 (10th Cir. 1982).

motions and do not toll the time for filing notice of appeal; rather, they are akin to Rule 60(a) motions to correct clerical errors in a judgment." Finally, the Third Circuit held in *Hayden v. Scott Aviation, Inc.*,[17] that correcting a failure to include non-discretionary pre-judgment interest is governed by Rule 60(a), not Rule 59(e).

While Rule 60(a), providing for the correction of clerical errors, limits the otherwise unrestricted scope of Rule 59(e), the same cannot be said of Rule 60(b). Rule 60(b) permits certain specifically described motions to be filed at a time later than ten days after entry of judgment. The rule allows relief from a judgment for a number of stated grounds but provides that a motion invoking the first three grounds must be made within a reasonable time not to exceed one year after entry of judgment.[18] Thus, while Rules 59(e) and 60(b) permit the same relief—a change in the judgment—Rule 60(b) extends the time within which relief can be sought. Rule 60(b) relief may be invoked, however, only for the causes specifically stated in the rule and, we hold, only after ten days following entry of judgment. If a motion is served within those ten days and may be characterized as a Rule 59(e) motion, it must be so treated, for Rule 4 of the Federal Rules of Appellate Procedure makes timing a fundamental consideration in classifying the motion as brought under Rule 59(e) or under Rule 60(b).

B.

Professor Moore states that, "[a]ny motion that draws into question the correctness of a judgment is functionally a motion under Civil Rule 59(e), whatever its label."[19] Virtually every circuit court has held that a

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17 684 F.2d 270, 271-72 (3rd Cir. 1982).

18 Fed.R.Civ.P. 60(b).

19 9 Moore's Federal Practice ¶ 204.12[1] at 4-67 (1985). *See also id.* ¶ 204.12[1] at 4-69 (1985).

motion that "calls into question the correctness of a judgment should be treated as a motion under Rule 59(e), however it is styled."[20] In *Fischer v. United States Department of Justice*,[21] another panel of this circuit recently noted general support for the principle. Although on several other occasions the Fifth Circuit has dealt with the issue of whether a motion to rehear, reconsider, or amend a judgment should be considered as one made under Rule 59(e) or under Rule 60, no definitive rule has developed.[22]

As the Advisory Committee has noted, the very purpose of amending Rule 4(a)(4) was to "make it clear that after the filing of the specified post trial motions, a notice of appeal should await disposition of the motion." In addition, the appellant "should file a new notice of appeal after the motion is disposed of."[23] Confusing the issue whether

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20 *Dove v. Codesco*, 569 F.2d 807, 809 (4th Cir. 1978). *Accord Cosgrove v. Smith*, 697 F.2d 1125, 1127-28(D.C. Cir. 1983); *Foman v. Davis*, 292 F.2d 85, 87 (1st Cir. 1961), *rev'd on other grounds*, 371 U.S. 178, 83 S.Ct. 227 (1962); *Lyell Theatre Corp. v. Loews Corp.*, 682 F.2d 37, 41 (2d Cir. 1982); *Rankin v. Heckler*, 761 F.2d 936, 942 (3rd Cir. 1985); *Western Industries, Inc. v. Newcor Cananda Ltd.*, 709 F.2d 16, 17 (7th Cir. 1983)(per curiam); *Seshachalam v. Creighton University School of Medicine*, 545 F.2d 1147, 1147 (8th Cir. 1976), *cert. denied*, 433 U.S. 909, 97 S.Ct. 2974 (1977); *Sea Ranch Association v. California Coastal Zone Conservation Commissions*, 537 F.2d 1058, 1061 (9th Cir. 1976), *but see United States v. 1982 Sugar 24' Spectra Boat*, 738 F.2d 1043 (9th Cir. 1984); *Miller v. Leavenworth-Jefferson Electric Cooperative, Inc.* 653 F.2d 1378, 1380 (10th Cir. 1981).

21 759 F.2d 401, 464 & n.4 (5th Cir. 1985)(per curiam)(noting conflict between *Harcon Barge* and *Willie*).

22 *See Fabian v. Reed*, 707 F.2d 147, 148 n.1.(5th Cir. 1983), *certificate denied and appeal dismissed*, 714 F.2d 39 (5th Cir. 1983)(per curiam); *Lapeyrouse v. Texaco, Inc.*, 670 F.2d 503, 583-84 (5th Cir. 1982); *Woodham v. American Cystoscope Co. of Pelham, N.Y.*, 335 F.2d 551, 554-55 (5th Cir. 1964); *Southern States Equipment Corp. v. USCO Power Equipment Corp.* 209 F.2d 111, 116-17 (5th Cir. 1953).

23 Fed.R.App.P. 4(a)(4) Advisory Committee note to 1979 amendment.

a post-judgment motion was one of the "specified post trial motions" would defeat this purpose. As the Seventh Circuit noted in *Western Industries, Inc. v. Newcor Canada Ltd.*,[24] "[p]ost-judgment motions filed within 10 days should where possible be construed as Rule 59(e) motions to avoid otherwise endless hassles over proper characterization."

Construing a motion as a Rule 60(b) motion in order to preserve an appeal would leave the timing of a notice of appeal incertain and introduce several troubling problems to our intricate maze of rules for vesting appellate jurisdiction:(1) counsel for appellants would be forced to file seriatim notices of appeal to avoid loss of substantive rights; (2) a mistake by counsel as to this timing would cost their clients substantive rights; and (3) both counsel for appellants and appellees, as well as the court, would waste valuable time briefing, debating, and deciding this jurisdictional issue. It is of great importance to have "guides sufficiently clear to prevent protective appeals and litigation over appellate jurisdiction."[25] The bright-line rule established here prevents such needless waste, avoids the potential loss of litigants' substantive rights, and preserves the virtue of clarity sought by Fed.R.App.P. 4(a)(4).

CONCLUSION

For the foregoing reasons, we dismisss the appeal of the appellant, Southern Pacific, who shall bear the costs. APPEAL DISMISSED.

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24 709 F.2d at 17.

25 15 Wright, Miller & Cooper, Federal Practice & Procedure, § 3913 at 523 (1976).

Supreme Court, U.S.
FILED
JUN 18 1986
JOSEPH F. SPANIOL, JR.
CLERK

NO. 85-2015

In the Supreme Court of the United States

OCTOBER TERM, 1985

SOUTHERN PACIFIC TRANSPORTATION COMPANY,
Petitioner

V.

HARCON BARGE COMPANY, INC., D & G BOAT RENTALS, INC. AND THE M/V CHARLES D, TIDEWATER-VENICE, INC. AND THE M/V IBERVILLE, ARTHUR SMITH CORPORATION AND THE M/V I.C. HOSKINS AND CANAL BARGE COMPANY AND THE M/V MARIAN HAGESTAD
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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49pp

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SUPPLEMENTAL APPENDIX A — Listing of all parent companies, subsidiaries and affiliates of petitioner in accordance with Rule 28 of the Rules of the Supreme Court of the United States A-1

SUPPLEMENTAL APPENDIX B — Opinion and judgment of the United States District Court for the Western District of Louisiana, December 8, 1982 B-1

CERTIFICATE OF SERVICE

SUPPLEMENTAL APPENDIX A

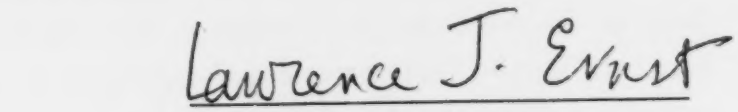
In accordance with Rule 28.1 of the Rules of the Supreme Court of the United States, petitioner, Southern Pacific Transportation Company, lists its parent companies, subsidiaries, and affiliates, as follows: Southern Pacific Transportation Company is a wholly owned subsidiary of Santa Fe Southern Pacific Corporation. The parent company of Southern Pacific Transportation Company is Southern Pacific Company. The subsidiaries of Southern Pacific Transportation Company or of its wholly owned subsidiaries are as follows:

1. St. Louis Southwest Railroad Company
2. Northwest Pacific Railroad Company
3. Pacific Fruit Express Company
4. Evergreen Leasing Corporation
5. Southwest Town Lot Corporation
6. Southern Pacific Equipment Company
7. Visalia Electric Railroad Company
8. Los Angeles Union Terminal, Inc.
9. Southern Pacific Warehouse Company
10. Pacific Motor Trucking Company
11. Pacific Motor Transport Company
12. Louis Heller, Inc.
13. Southern Pacific Air Freight, Inc.
14. Southern Pacific International, Inc.

Affiliate companies of Southern Pacific Transportation Company are as follows:

1. Alton and Southern Railway Company
2. Central California Traction Company
3. Ogden Union Railway and Depot Company

4. Portland Terminal Railroad Company
5. Portland Traction Company
6. Sunset Railway Company
7. Harbor Belt Railway Trailer Train Company
8. St. Louis Southwest Railway Company
9. Arkansas and Memphis Railway Company
10. Southern Illinois and Missouri Bridge Company
11. Terminal Railway Association of St. Louis
12. Kansas City Terminal



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SUPPLEMENTAL APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION
SECTION S

HARCON BARGE COMPANY, INC.

VS. CIVIL ACTION NUMBER 791592

D & G BOAT RENTALS, INC.

SOUTHERN PACIFIC TRANSPORTATION CO.

VS. CIVIL ACTION NUMBER 800511

M/V I. C. HOSKINS, ET AL

SOUTHERN PACIFIC TRANSPORTATION CO.

VS. CIVIL ACTION NUMBER 800512

M/V IBERVILLE, ET AL

SOUTHERN PACIFIC TRANSPORTATION CO.

VS. CIVIL ACTION NUMBER 800513

M/V CHARLES D, ET AL

SOUTHERN PACIFIC TRANSPORTATION CO.

VS. CIVIL ACTION NUMBER 800514

M/V MARIAN HAGESTAD, ET AL

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OPINION

JOHN M. SHAW
UNITED STATES DISTRICT JUDGE

Four of the five consolidated cases herein involve collisions in April, and May, of 1979, whereby tugs pushing barges and a light boat struck the northeast dolphin or hydrocushion of the Southern Pacific Railroad Bridge at Berwick, Louisiana. The other consolidated case came about as the result of the sinking of one of the barges due to the first collision. As the testimony of a number of the same witnesses was essential in two or more of the cases, consolidation of all was the logical solution.

The existing bridge was constructed in 1972, with an opening of 320 feet for navigation. The northeast section initially had a fixed structure to protect the railroad bridge from collisions with vessels and after its destruction, the dolphin was changed in 1973, to include a suspended ring of concrete which was rebuilt in 1974, after another collision. This movable type dolphin was superior to the old fixed structure and was unquestionably an advancement of the art. It was cheaper to construct and did a better job than the old protective system. There were several vessel collisions with the dolphin from 1974 to 1979, prior to the collisions involved herein, the most serious being the National Goal collision on January 14, 1979. The dolphin was then repaired at a cost of approximately $59,000.00 in February of 1979, and although it was struck again in March of 1979, the evidence is clear that it was in good condition and not in need of repair at the time of the first collision in these consolidated cases.

The dolphin is constructed of nine fixed steel pilings driven into the riverbed, and placed in a circular pattern with one piling in the center. The piling cluster is welded

together near its top, on top of which is mounted a wagon wheel which will turn upon contact. The concrete ring is suspended from eight metal hangers attached to the wagon wheel. The dolphin's ring of concrete resembles a donut sliced into four sections which is held together by steel joints. With each concrete section weighing approximately 100 tons, it is more feasible to assemble the ring in sections than as an integral member. Although the concrete ring is allowed to move, there is a limit. Once it is pushed to the limit of its mobility, which is against the steel pile superstructure, it will deform the structure itself if the force is continued. However, this does not appear to be the case herein as none of the collisions involved caused any damage to the pilings, which was confirmed by an underwater inspection in June of 1979. Southern Pacific claims that as a result of the four collisions it suffered damage to its dolphin system in the amount of $324,400.00, and that is has been unable to segregate the particular damage resulting from any one collision.

Harcon Barge has sued the Southern Pacific for the sinking of its barge, the RT 407, alleging that a padeye on the dolphin protruded into the navigable waterway, cutting a gash in the starboard side of the RT 407 when it was driven against the dolphin by the M/V Charles D in the first collision. Harcon has settled with the Charles D and reserved its rights against the Southern Pacific.

The defendant, M/V Iberville, asserted a third party complaint against the United States of America on the ground that the Coast Guard negligently directed the M/V

Iberville to proceed downstream through the bridge at the same time it directed another barge and pushboat to proceed upstream through the bridge, thereby forcing the M/V Iberville to reverse its engines in an attempt to avoid a collision with the oncoming vessel and/or the bridge or its dolphin, but despite its every effort to do so, the M/V Iberville was carried by the dangerously swift current of the Atchafalya River into the northeast dolphin of the bridge. The U.S.A. has been dismissed for reasons hereinafter set forth.

Harcon Barge Company, Inc. V. D & G Boat Rentals, et al
Findings of Fact

1.

The Charles D incident occurred on April 7, 1979, at 11:50 p.m. as the M/V Charles D was proceeding downriver pushing the RT 407 and AD 17, two 195' barges loaded with limestone. The RT 407 and AD 17 were inland river open hopper barges attached together at the box end with the AD 17 leading at the time of the collision. The barges had been loaded with limestone approximately one week earlier at Paducah, Kentucky, and at the last measurement at Bayou Sorrell Locks averaged 2.8' of free board. The RT 407 had been inspected prior to loading at Paducah, which inspection revealed no holes nor visible cracks or creases, and had a normal level of water in its inner compartments. The barge was twenty years old and capable of navigation when it left Paducah.

2.

The Charles D lost control and began to angle downriver near the railroad bridge at Morgan City, Louisiana, and the second barge in tow, the RT 407, aft end forward, struck the northeast hydrocushion at a northwesterly point on the channel side of the dolphin. The barge dragged along the side of the dolphin for nearly half the length of its starboard side before clearing the dolphin and regaining the channel. After the accident, the barge had a ½"-¾" crease, or scratch, in it 85' long along the starboard side, approximately 15" below the deck beginning 42' aft of stern and continuing 17' before evidencing a gouged area of 8' along the #2 starboard wing compartment, the scratch then continuing 60' more toward the bow at a slight descending angle. Although Southern Pacific contends the crease was caused either prior to or after the accident in a manner unrelated to the barge's contact with the dolphin, the Court is convinced by a preponderance of the evidence that the ½"-¾" crease was caused by a protruding padeye on the hydrocushion.

3.

The dolphin had an anti-sparking protection device consisting of autombile tires suspended by cables, the cables attached to the dolphin through two sets of padeyes, one of the channel side and the other upriver, protruding 3" beyond the dolphin's surface. The padeyes are made of ½" plate steel and are spaced at 2' intervals starting 9" from the top of the dolphin. At issue here are the padeyes found at a northwest point on the channel side of the dolphin.

4.

Southern Pacific designed the anti-sparking device to satisfy Coast Guard requirements for a spark-free surface on the northwest side of the dolphin, where it is vulnerable to impact from vessels navigating downriver. The plans submitted by Southern Pacific for Coast Guard approval, however, did not show the padeyes either on the channel side, nor on the upriver side of the dolphin where the second set is found. The Coast Guard approved the tire arrangement as an anti-sparking device but did not authorize the padeyes by the permit issued to Southern Pacific in 1973, for construction of the dolphin.

5.

Although the automobile tire arrangement was adequate, the Court finds that the padeyes used to attach the cables to the dolphin presented a danger to navigation. Vessels frequently lose control and strike the hydrocushion at this point of the river, and, as herein, can be seriously damaged by the protruding metal.

6.

The evidence overwhelmingly preponderates in favor of the Court's conclusion that the padeye protrusion caused the gash in the side of the RT 407. Testimony established that the starboard side of the barge scraped along the northwest section of the hydrocushion for the greater half of its length. The ½"-¾" scrape found on the RT 407 after the collision matched perfectly the ½" thickness of the padeye. The gash and the penetration appeared in a

continuous line and appeared to have been caused by a sharp or hard object and by one incident. Rust discoloration evidenced that the scratch was of recent vintage when the barge was drydocked in August of 1979. Further, evidence established that if the dolphin were pushed to its limit upon impact, it is probable that only one mark would have been scratched on the barge, rather than several at 2' intervals, and that the scratch mark would appear in a straight line rather than one which would have appeared jagged, arcked or broken had the dolphin been moving.

7.

Evidence does not support defendant's contention that the gash resulted from a weld fracture, which would have been visually apparent upon inspection in drydock after the sinking. The Court also rejects any contention that the scratch and the gouged area might have been caused when the RT 407 was still moored at Paducah, or after the accident, either before mooring, during, or in the course of salvage operations, as there is no evidence in support thereof.

8.

Upon impact with the hydrocushion the lead barge, AD 17, broke out of tow and when it was recaptured was tied along the starboard side of the RT 407 for mooring across from the D & G Boat Yard, while the M/V Charles D was drydocked for scheduled repairs. D & G personnel performed three walkaround inspections, one immediately following the accident and two the following day, in the morning and early afternoon, which revealed no holes in

the barge and that the RT 407 was not taking on water. No one ever separated the AD 17 from the RT 407 to examine the starboard side of the RT 407 damages. D & G did not post a watch over the two barges. At about 1:30 p.m. on the afternoon of April 9, approximately thirty-six hours after the accident, the barge had developed a serious starboard list and sank.

9.

The court concludes from a preponderance of the evidence that the barge sank as a direct result of its taking on water through the gouged area opening into the #2 starboard wing compartment. A starboard list due to shifting cargo combined with water collected in the cargo space or the hull lessened the freeboard on the damaged side, and the Court finds that the hole was less than 17" above the waterline when the barge was moored*, where wave wash caused by heavy river traffic lapped up between the RT 407 and AD 17 causing water to enter the barge and gradually sink it.

10.

It is apparent to the Court that D & G Boat Rentals personnel performed inadequate inspections of the barge, at best. The collision with the dolphin was severe enough to have put D & G personnel on notice of possible hull damage; the gash was above the waterline and would have

*With 2.8' of freeboard the gouged area, 15" below the deck, would have been 17" above the water line.

been visible had the crew checked for exterior damage to the hull. Additionally, inspections would have revealed that the RT 407 was taking on water in time enough for the barge to be saved, had the crew check more thoroughly, or more frequently.

11.

Although disputed, the Court finds that the RT 407 was in good condition in April of 1979, and that its fair market value at the time was $105,000.000. The parties stipulated that the RT 407 was a constructive total loss.

12.

The parties also stipulated that Harcon Barge Company sustained damages in the amount of $111,296.75 in salvage, miscellaneous expenses and cargo loss.

Conclusions of Law

1.

This matter falls within the admiralty and maritime jursidiction of the Court, 28 U.S.C. § 1333.

2.

The Court finds that D & G Boat Rentals was negligent in striking the northeast dolphin, which con-

tributed ultimately to the ruination of the RT 407.* There is no evidence that the collision was caused by an act of God nor by any fault on the part of defendant, Southern Pacific. The collision was a direct result of the M/V Charles D captain's failure to maintain proper control of the vessel, and proximately caused the RT 407 to sink.

3.

Although not at fault in causing the collision, Southern Pacific's negligence was also a proximate cause of damage suffered by Harcon Barge. Southern Pacific knew or should have known that the placement of the padeyes on the channel side of the dolphin presented a serious risk of harm to vessels in navigation. The dolphin system was designed by the railroad to withstand the impact of collisions; Southern Pacific cannot now contend it was not foreseeable that a moving vessel would strike the hydrocushion and be damaged by the protruding metal. The Court concludes that Southern Pacific was negligent in constructing and maintaining the padeyes on the exposed side of the dolphin and that this negligence contributed to the sinking of the RT 407.*

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*Possession and control of the RT 407 was turned over to D & G Boat Rentals by the Harcon Barge Company. Therefore, any negligent acts on the part of D & G causing damage to the RT 407 cannot be attributed to Harcon Barge.

*Because the Court has found that Southern Pacific was negligent in constructing and maintaining the padeyes, there is no need to address the applicability of the Pennsylvania rule.

4.

D & G Boat Rentals' failure to adequately inspect the RT 407 following the collision also constitutes negligence and was a concurrent cause of damage to the RT 407. D & G personnel should have more thoroughly inspected the exterior of the hull as well as the interior compartments to avoid the foreseeable consequences of the barge taking on water and sinking.

5.

The rule in admiralty is that when two or more parties have contributed by their fault to cause property damage in a maritime collision, liability for such damage is to be allocated proportionately to the comparative degree of their fault. *United States v. Reliable Transfer Co.*, 421 U.S. 397, 44 L.Ed.2d 251, 95 S.Ct. 1708 (1975). If a negligent party has settled the Court may still consider that party's negligence in the allocation of damages. *Leger v. Drilling Well Control, Inc.*, 592 F.2d 1246 (5th Cir. 1979). The Court has determined that the concurrent fault by D & G Boat Rentals and Southern Pacific Transportation Company contributed to the sinking of the RT 407 and allocates liability against each in the following proportions: Ninety (90%) per cent against D & G Boat Rentals, and ten (10%) per cent against Southern Pacific.

6.

Southern Pacific is liable to Harcon Barge Company for a total of ten (10%) per cent of the fair market value of the RT 407 in April, 1979, and of the damages sustained by

Harcon Barge as a result of the sinking in salvage, miscellaneous expenses, and cargo loss, or $21,629.68.

7.

Southern Pacific argues that since the RT 407 was a constructive total loss, that it should not be cast in damages for the cost of salvage, which was slightly less than the fair market value of the barge at the time of its sinking. The argument is without merit. 33 U.S.C. § 409, referred to as the Wreck Act, imposes a duty on the owner of a sunken craft to remove it from navigable channels, or to abandon it and subject it to removal by the United States. Jurisprudence has left the choice to the owner:

> "The owner of a vessel sunk without any negligence on his part is still subject to the statutory obligation to remove the wreck, but is given an option: he may either raise the vessel himself and seek recovery of the expenses from the party responsible for the sinking, or he may abandon the vessel and allow the United States to bear the burden of removal and recovery of expenses from the negligent party." *St. Paul Fire & Marine Ins. v. Vest Transp.*, 666 F.2d 932, 940 (5th Cir. 1982).

Harcon Barge Company was fulfilling its statutory obligation in removing the RT 407 from the river, and may proceed against the negligent parties for the cost of salvage. Southern Pacific is liable for its proportionate allocation of negligence, as discussed above.

8.

Plaintiff, Harcon Barge, is entitled to an award of prejudgment interest of 9.07% from April 9, 1979, when the RT 407 sank. The Court has not found "peculiar circumstances" which would justify a denial prejudgment interest or make it inequitable for the defendant to be forced to pay it. *Pluyer v. Mitsui O.S.K. Lines,* 664, F.2d 1243 (5th Cir. 1982); *Ceja v. Mike Hooks, Inc.,* 690 F.2d 1191 (5th Cir. 1982).

Southern Pacific Transportation Co. V.
M/V I. C. Hoskins, et al
Southern Pacific Transportation Co. V.
M/V Iberville, et al
Southern Pacific Transportation Co. V.
M/V Charles D, et al
Southern Pacific Transportation Co. V.
M/V Marian Hagestad, et al

Findings of Fact

1.

The M/V Charles D's tow, the barge RT 407, struck the hydrocushion on April 7, 1979, near midnight in the first of these consolidated collisions. The Court finds that the collision caused substantial damage to the concrete around the joints and to the hangars. All bolts were bent to some degree, two of these severely. The concrete was chipped or cracking in some places. No survey was conducted, however, to determine the amount or extent of damages after the Charles D collision.

2.

On April 25, 1979, at 12:20 p.m., the M/V Iberville, a Tidewater Venice, Inc. 185' bridge supply vessel (a light boat), carrying no cargo, hit the hydrocushion port side midships, denting the bump rail on the vessel and knocking a chip of concrete off the dolphin approximately 3'-4' wide and 2½' high. The M/V Iberville had been holding in idle above the railroad bridge in order to let a northbound vessel and its tow clear the railroad bridge, and the Iberville got into a position where the current was too swift for it to maintain its position.

3.

The United States Coast Guard maintains a Vessel Traffic Service (VTS) at the railroad bridge to assist vessels in the safe navigation of the bridge. Tidewater Venice, Inc. filed a third party demand against the United States on June 29, 1981, alleging that the Coast Guard VTS operator had failed to inform the captain of the M/V Iberville of the northbound vessel in time enough for him to hold back. Captain Thibodeaux of the M/V Iberville testified that he had tried to establish contact with VTS but the radio channels were busy and that once he made contact, the VTS operator instructed him to proceed downriver through the railroad bridge. The Court however, noted the absence of a customary entry in the ship's log to this effect. Further, the VTS operator testified that the first notice he had of the proximity of the vessel was upon viewing it above the highway bridge, and that he immediately contacted the Iberville captain to inform him of the northbound vessel.

4.

The Court finds that, in accordance with Coast Guard regulations, it was incumbent on the M/V Iberville to contact the VTS before attempting to transit the bridge area, and that Captain Thibodeaux failed to do so. The Court further finds that the Iberville caused hangar and concrete damage to the hydrocushion. However, other than a brief inspection by the bridge tender immediately following the accident, Southern Pacific made no attempt to assess the damages before the next collision three days later.

5.

The M/V I. C. Hoskins, owned by the Arthur Smith Corporation, pushing two empty barges downriver on April 28, 1979, made contact with the hydrocushion near midnight and slid along it. The point of contact scratched 100' of the lead barge and 50' of the second one in a period of about one minute. Neither the boat captain nor the bridge tender noted any swing movement of the dolphin. The boat captain testified that the barges were scratched by a fixed overhead metal member of the hydrocushion which juts out past the concrete, which evidence is supported by the fact that the unloaded barges sat high on the water, with a 10.5' freeboard. The Court finds that the M/V I. C. Hoskins caused no structural damage to any part of the dolphin.

6.

The fourth and final accident in these consolidated actions occurred on May 3, 1979, at 8:52 p.m., when the M/V Marion Hagestad, a Canal Barge Company tug, pushing

two barges loaded with anhydrous ammonia, struck the dolphin at a northwest point on the hydrocushion. The captain of the Marion Hagestad managed to clear the barges but the middle of the tug hit the dolphin after an unsuccessful attempt to realign with the channel. The bridge tender on duty saw the dolphin moving back and forth upon impact, silhouetted in the lights from the vessel. His inspection revealed further hangar damage and a chip of concrete 4" x 8" x 6" fallen between the rubber bumpers on the dolphin.

7.

In January of 1979, the M/V National Goal and M/V Venture II caused substantial damage to the hangars when each collided with the dolphin. Southern Pacific contracted with Boh Bros. Construction Company to repair the damage for a total cost of $59,000.00 which work was performed on site and completed in mid-February, 1979. All defendants contend that these two incidents, combined with water movement and the impact of other collisions over the life of the dolphin, caused cumulative damage to the four joints in the concrete ring which had never been repaired and for which they should not be held accountable. The Court rejects this contention, and finds that the dolphin was in perfect working condition at the completion of the repairs, with neither residual structural damage nor weakened joints.

8.

In March of 1979, the dolphin suffered two more "brushes", by the M/V Ricohac and the M/V Eddie R. A

preponderance of the evidence established that neither of these two vessels caused any damage to the hydrocushion.

9.

David Fullerton, district claims adjuster for Southern Pacific, inspected the damage caused to the dolphin on April 9, following the Charles D incident, and on April 29, following that of the M/V I. C. Hoskins. Because the M/V I. C. Hoskins caused no damage to the hydrocushion, Mr. Fullerton's testimony and photographs were helpful to the Court in comparing the extent of damage caused the hydrocushion by the M/V Charles D and the M/V Iberville. The Court is convinced that the Charles D caused both joint and hangar damage, and that the Iberville aggravated the apparent damage.* Because a survey was not conducted, however, the Court does not know to what extent the structural integrity of the dolphin was impaired after the Charles D collision.

10.

On May 3, 1979, prior to the M/V Marion Hagestad collision, Mr. Fred Alley, engineer of bridge maintenance for Southern Pacific and the designer of the northeast hydrocushion, performed a walk-on inspection of the dolphin. At that time he determined that the dolphin had

*"Play" in the joints which can be detected when standing on the dolphin is an indication of how loose the joints are and how badly in need of repair. Testimony established that the play in the joints between the first and third collisions increased. Additionally, the M/V Iberville collision caused further bending and distortion of the hangars.

sustained serious joint and hangar damage and that the structure would have to be removed from the water to be satisfactorily repaired. Extensive joint damage was confirmed by an underwater inspection of the joints performed in June, 1979.

11.

Southern Pacific drew up plans and specifications for the reconditioning of joints and hangars and repair of damaged concrete, which called for the construction of two new concrete ring sections and repair of the four damaged sections, with the dolphin ultimately to have two new and two reparied sections, and two repaired sections to remain in storage. The plans provided that two sections at a time be removed to the bank and immediately replaced with two good sections, in order to minimize exposure to the railroad bridge. Bids were let and the low bid came in at a total cost of $324,400.00 from Boh Bros. Construction Company, which the evidence established was a reasonable price to perform the work specified.

12.

The plans called for betterments to the dolphin, by the addition of angles to the joint connections, revision of the hangar connection, and a new bumpering system. The total cost of the improvements was estimated by Boh Bros. at $52,200.00, which figure was included in the $324,400.00 bid and would have to be deducted from any recovery.

13.

Robert Wadhams, Registered Civil Engineer,

estimated the cost of reworking the dolphin by building four new concrete sections rather than two new ones as per plans and specifications, using the same figures Joe Timphony of Southern Pacific had used in estimating costs of labor, materials, equipment rentals, etc. His estimate of the repair work after deducting the cost of the betterments was $227,170.000.* The Court finds that Southern Pacific could have saved money by building four new concrete sections and would limit its claim to that amount.

14

The Court finds that the hydrocushion could have been inspected and surveyed for joint damage following the M/V Charles D collision. Militating against this conclusion is the testimony of Walter Blessey, who testifed that joint damage could only be determined by raising the hydrocushion out of the water. Joints run the length of the donut ring, and extent of separation from the concrete crucial to the integrity of the structure may occur below the waterline. Yet Southern Pacific's own experts admitted that a diving inspection to feel the extent of joint separation could be performed. And although the water may have

*This amount does not include the cost of removing the four old sections. Southern Pacific had figured the cost of repairing the two old sections at $7,500.00 each and the cost of removing two, alternatively, at $25,000.00. Since Southern Pacific would save defendants $10,000.00 by repairing two sections, it argues that it should recover this cost, as defendants would otherwise be liable for the higher cost of removing the sections. Since the Court finds that plaintiff had no intention of ever removing the sections from the Southern Pacific yard, it would not allow the cost of removal as a recoverable item of damage. Neither should defendants bear the cost of repairing old sections in addition to construction of new.

been too high and the current too swift to conduct an exterior underwater inspection of the hydrocushion in April, 1979, experts also testifed that an underwater inspection could have been successfully performed from the inside of the concrete ring, where divers would not have been hampered by the treacherous waters. The Court is not convinced, however, that an underwater inspection of the exterior joints of the hydrocushion could not have been made by hanging ladders over the top of the concrete ring for divers to climb down to make an inspection of the joints. (See Trial Exhibit SP 61-F). Finally, a walk-on inspection by an engineer such as the one conducted by Fred Alley on May 3, 1979, might have been performed and revealed the extent of joint deterioration after the Charles D. collision. If the joints had not begun to separate above the waterline,* such an inspection could well have been futile. If, on the other hand, the Charles D accident caused some joint separation above water, an engineer could have upon visual inspection made reasonable assumptions about the total extent of damage, upon which repair estimates could have been based.

15.

No estimates were taken nor surveys conducted for repair of concrete or hangar damage, nor for repair of joint damage, to the extent this could have been ascertained by walk-on or diving inspection, in the two and one-half week

*Testimony established that separation of the joints above the waterline would indicate the extent of separation and deterioration for the length of the hydrocushion, below the waterline.

period following the Charles D collision. Southern Pacific at all times retained control of its property, and did not contact D & G Boat Rentals to participate in a damage estimate of the dolphin. At no time in 1979, nor during the course of this trial did Southern Pacific attempt to ascertain or establish damages attributable to each defendant in these consolidated cases. This is not a case involving joint tortfeasors wherein the Court could award damages on a percentage basis. Southern Pacific knew that in the short life of the dolphin it had been struck many times by vessels and should have known that damage caused by D & G Boat Rentals was likely to be aggravated by another passing vessel losing control in the swift current of the Atchafalaya.

Conclusions of Law

1.

At trial, the Court dismissed the third party claim of Tidewater, Inc. against the United States, reserving its reasons. The Court concluded that the claim was invalid on two grounds.

2.

The U. S. Coast Guard was not at fault in the M/V Iberville incident. The evidence established that the captain of the Iberville failed to timely contact the VTS and that such failure, along with his failure to maintain control of the vessel and properly navigate the channel, were the legal causes of the accident.

3.

The claim against the United States was time-barred. Tidewater's claim against the United States is maintainable solely under 46 U.S.C. § 741, et seq., the Suits in Admiralty Act, *McCormick v. United States,* 680 F.2d 345 (5th Cir. 1982), which has a prescriptive period of two years. The Iberville collided with the dolphin on April 25, 1979, and Tidewater did not file its third party demand against the United States until more than two years later, June 29, 1981.

4.

Tidewater's contention that its demand against the United States is for contractual or tortious indemnity is without merit. The claim alleged, if proven, would be for contribution. The prescriptive period therefore began to run from the date of the accident and was tolled before Tidewater Venice filed its third party demand.* See, *United New York Sandy Hook Pilots' Association, et al v. United States of America,* 355 F.2d 189 (2nd Cir. 1965); *McAllister Lighterage Lines, Inc. v. Pennsylvania R. Co.,* 99 F.Supp. 648 (E.D.N.Y. 1951).

*Tidewater was not sued by Southern Pacific until more than two years after the date of the accident, and however inequitable it may be that their third party demand against the United States was extinguished before they were sued for damages to the hydrocushion, the two year period of limitations is jurisdictional. *T. J. Falgout Boats, Inc. v. United States,* 508 F.2d 855 (9th Cir. 1974). The two year statute of limitations cannot therefore be extended for equitable reasons.

5.

Southern Pacific's claim for damages against the Arthur Smith Corporation and the M/V I. C. Hoskins is not supported by the evidence and is dismissed.

6.

Southern Pacific has proved that it was damaged by the remaining three defendants, and that this damage was caused by each defendant's negligence in striking the dolphin. As concluded above in relation to the Charles D collision, the Court finds that the M/V Marion Hagestad and the M/V Iberville accidents could have been avoided by the exercise of reasonable care, and that Southern Pacific was not itself at fault in causing the accidents.

7.

The evidence is clear that after the Charles D collision two hangar bolts were in serious condition, and in the Court's opinion would have to be replaced. Although no estimate of this cost was made at that time the record is clear that as a result of the National Goal collision in January of 1979, the replacement of three (3) sheared hangar bolts along with the concrete work necessitated thereby cost $59,000.00. The Court feels that an award of $40,000.00 for the damage caused by the Charles D would be appropriate and will assess this amount against D & G Boat Rentals and the Charles D. Although additional damage was probably caused by the Charles D collision the evidence does not support any additional award.

8.

The M/V Iberville knocked a chip of concrete off the dolphin approximately nine feet wide, substantially larger than that chipped by the M/V Marion Hagestad which was proved to cost $800.00 to repair. Allen Lohrmand, Southern Pacific bridge and building supervisor in 1979, testified that the Iberville damaged the hydrocushion in the amount of $4,000.00. The Court will allow an award of $2,000.00 against Tidewater Venice, Inc. and the M/V Iberville. Again, although the Court feels that some joint and hangar damage was proved against the M/V Iberville, there is no evidence in the record to support an award therefor.

9.

Canal Barge Company is liable to Southern Pacific for repair of concrete damage caused to the dolphin by its vessel, the M/V Marion Hagestad, in the amount of $800.00. No joint or hangar damage to the hydrocushion was proved against Canal Barge Company. Indeed, evidence established that the joints and hangars were already inoperative by the time the Marion Hagestad hit the dolphin on May 3, 1979, which relieves Canal Barge Company of any liability for the structural damage.

10.

The hydrocushion was structurally sound and in perfect repair when the Charles D. hit it, and by the time Fred Alley inspected it on May 3, 1979, after two subsequent collisions it had sustained severe damage

necessitating repair in the amount of $227,170.00. Although the Court concludes that this damage was caused by the M/V Charles D and M/V Iberville collisions, there is no evidence to support an equal or unequal apportionment of damages between the two defendents.

11.

It is a fundamental principle of tort law that a plaintiff should be compensated for injury caused by a negligent wrongdoer. Equally compelling however is the principle that a defendant's liability should be limited to that part of plaintiff's harm which he has in fact caused. The plaintiff ultimately has the burden of proving not only that he was damaged by a negligent defendant, but also the amount of the damage proximately caused by the negligent act. *Sweet Milk v. Stanfield,* 353 F.2d 811 (9th Cir. 1965). Although a plaintiff need not demonstrate the amount of damages with mathematical precision, he must at least provide sufficient evidence to take the amount being claimed out of the realm of speculation and conjecture. *Cordeco Development Corp. v. Santiago Vasquez,* 539 F.2d 256 (1st Cir. 1976).

12.

Plaintiff has proved its total damages and fault of two parties and cities *United States v. Reliable Transfer Co.,* 421 U.S. 397 (1975) in support of its argument that the Court should allocate liability among the parties proportionately to the comparative degree of their fault. Plaintiff's reliance on *Reliable Transfer,* however, where the Court apportioned damages between tortfeasors in an

incident involving mutual fault, is misplaced. The case herein involved four separate incidents consolidated for trial purposes only, and it would constitute error to conclude that the remaining defendants are mutually bound to plaintiff for a single wrong. Southern Pacific must still prove its damages as to each defendant for each separate and separable incident.

13.

Plaintiff next cites *Botazzi v. Petroleum Helicopters, Inc., et al,* 644 F.2d 49 (5th Cir. 1982) in support of its contention that where more than one defendant's acts combine to cause harm, the burden shifts to each to show what portion he caused, failing which, each is jointly and severally liable for the total damages. *Botazzi* is also inapposite. The case involved two separate helicopter accidents causing severe psychological damage to a single plaintiff.* The Court found that it was impossible to ascertain the psychological damage caused plaintiff by each accident, and divided damages equally between the two defendants. The Court feels that an equal division of damages here would be inappropriate, as, unlike the situation in *Botazzi,* the damages herein might have been reasonably ascertained by a marine survey or other type inspection following the Charles D. collision.

*Plaintiff brought suit against the two different defendants separately and the two suits were consolidated for trial.

14.

Other multicollision cases cited by plaintiff, where the burden of proof was shifted to defendants to segregate the damages caused to plaintiff, or where the Court allowed an imprecise apportionment of damages based on reasonable estimates, are inapplicable. *Daniels Towing Service, Inc. v. Nat Harrison Associates,* 432 F.2d 102 (5th Cir. 1970), *Moran Towing Corp. v. M. A. Gammino Construction Company,* 363 F.2d 113 (st Cir. 1966), 409 F.2d 917 (1st Cir. 1969), *Huddell v. Levin,* 537 F.2d 726 (3rd Cir. 1976). This is not a case wherein the Court is forced to apportion damages between a negligent plaintiff and a negligent defendant, nor is it a case involving the apportionment of damages between solidarily bound tortfeasors. These are four cases consolidated for the convenience of the parties and the Court. Absent circumstances which would justify a shift of the burden of proof or facts to support an imprecise apportionment, each defendant is liable only for the damage proved against it. Plaintiff has not proven to the satisfaction of the Court that damages could not have been ascertained nor a reasonable estimate of damages taken in the seventeen-day-period following the Charles D. incident. The underlying rationale of all cases cited by plaintiff is to allow an injured plaintiff to recover from negligent wrongdoers where the plaintiff cannot reasonably apportion damages between them, nor ascertain with precision the damage caused by multiple parties.

15.

A walk-on inspection after the Charles D collision might have revealed severe separation of the joints above

the water, which experts established would indicate joint separation under the water as well. A visual inspection might have indicated joint damage but that major repair was not yet necessary, or that the structural integrity of the hydrocushion was not endangered at all by the Charles D collision. A diving inspection conducted from the inside of the concrete ring might have established that the Charles D caused damage that could not be estimated without removing the hydrocushion from the water, which the railroad company may have reasonably refused to do when the waters were high and the current dangerous.

16.

The Court does not know if the damages were ascertainable or not after the Charles D collision. It may well have been that the damages could not have been reasonably determined at that time. What the Court does know, however, it that in at least one instance, when Mr. Fred Alley inspected the dolphin on May 3, 1979, the damages were ascertainable and were ascertained when Mr. Alley determined that replacement of joints was necessary to preserve the structural integrity of the dolphin.

17

The Court concludes that the plaintiff has not met its initial burden of proving that the damages were incapable of apportionment between the M/V Charles D and the M/V Iberville. Under the facts of this case, the law does not allow plaintiff the luxury of a shift to defendants of the burden of proving damages caused by each, nor the Court

the ease of dividing damages between the two defendants. Southern Pacific knew that collisions with the dolphin system were frequent. More importantly, Southern Pacific retained control of its property and neglected to attempt an assessment of damages unitl after two unfortunate accidents later. At this point it was impossible to determine which vessel caused what damage. Although it is unfair to a damaged plaintiff to remain uncompensated, it would be equally unfair for a defendant who caused very little damage to be cast for major repair, in a case such as this where damages might have been ascertained by the plaintiff prior to a subsequent wrong.

18.

Accordingly, the Court will award judgment herein in favor of Southern Pacific Transportation Company and against M/V Charles D, et al, in the amount of FORTY THOUSAND AND NO/100 ($40,000.00) DOLLARS against M/V Iberville, et al, in the amount of TWO THOUSAND AND NO/100 ($2,000.00) DOLLARS, and against M/V Marian Hagestad, et al, in the amount of EIGHT HUNDRED AND NO/100 ($800.00) DOLLARS, as these damages could be segregated and allocated to each of the responsible parties.

19.

The Court will allow an award of prejudgment interest of 9.07% from date of each respective accident against the M/V Charles D, the M/V Iberville and the M/V Marian Hagestad. The Court has not found "peculiar cir-

cumstances" which would justify a denial of prejudgment interest or make it inequitable for the defendants to be forced to pay it. *Pluyer v. Mitsui, supra; Ceja v. Mike Hooks, Inc., supra.*

Opelousas, Louisiana, December 8, 1982.

/S/ JOHN M. SHAW

JOHN M. SHAW
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION
SECTION S

Filed Dec 8 1982

HARCON BARGE COMPANY, INC.
VS. CIVIL ACTION NUMBER
D&G BOAT RENTALS, INC. 791592

SOUTHERN PACIFIC TRANSPORTATION CO.
VS. CIVIL ACTION NUMBER
M/V I. C. HOSKINS, ET AL 800511

SOUTHERN TRANSPORTATION CO.
VS. CIVIL ACTION NUMBER
M/V IBERVILLE, ET AL 800512

SOUTHERN PACIFIC TRANSPORTATION CO.
VS. CIVIL ACTION NUMBER
M/V CHARLES D, ET AL 800513

SOUTHERN PACIFIC TRANSPORTATION CO.
VS. CIVIL ACTION NUMBER
M/V MARIAN HAGESTAD, ET AL 800514

JUDGMENT

These consolidated cases came on for trial before the Court, District Judge John M. Shaw presiding. After hearing the law and the evidence presented, and in accordance with the Findings of Fact and Conclusions of Law filed herewith,

It is ORDERED, ADJUDGED AND DECREED that there be judgment herein in favor of plaintiff, Harcon Barge Company, and against defendant, Southern Pacific Transportation Company, in the amount of $21,629.68, with 9.07% interest from April 9, 1979, until paid, Southern Pacific to bear costs.

It is further ORDERED, ADJUDGED AND DECREED that there be judgment herein in favor of defendants, M/V I. C. Hoskins and the Arthur Smith Corporation, dismissing the claims of Southern Pacific Transportation Company against them, Southern Pacific to bear costs.

It is further ORDERED, ADJUDGED AND DECREED that there be judgment herein in favor of plaintiff, Southern Pacific Transportation Company, and against M/V Iberville and Tidewater Venice, Inc., in the amount of TWO THOUSAND AND NO/100 ($2,000.00) DOLLARS, with 9.07% interest from April 25, 1979, until paid, and in favor of the United States of America, dismissing the third party demand of defendants, M/V Iberville and Tidewater Venice, Inc. to bear costs.

It is further ORDERED, ADJUDGED AND DECREED that there be judgment herein in favor of plaintiff, Southern Pacific Transportation Company, and agaiinst M/V Charles D and D&G Boat Rentals in the amount of FORTY THOUSAND AND NO/100 ($40,000.00) DOLLARS, wiith 9.07% interest from April 25, 1979, until paid, defendants, M/V Charles D and D&G Boat Rentals, to bear costs.

It is further ORDERED, ADJEDGED AND DECREED that there be judgment herein in favor of plaintiff, Southern Pacific Transportation Company, and against M/V Marian Hagestad and Canal Barge Company, in the amount of EIGHT HUNDRED AND NO/100 ($800.00) DOLLARS, with 9.07% interest from April 25, 1979, until paid, defendants, M/V Marian Hagestad and Canal Barge Company to bear costs.

Opelousas, Louisiana, December 8, 1982.

/s/

JOHN M. SHAW
UNITED STATES DISTRICT JUDGE

CERTIFICATE OF SERVICE

I hereby certify that three copies of the Supplemental Appendices have been served upon all counsel of record:

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Lawrence J Ernst

Lawrence J. Ernst

No. 85-2015

Supreme Court, U.S.
FILED
OCT 8 1986
JOSEPH F. SPANIOL, JR.
CLERK

In The
Supreme Court of the United States
October Term, 1985

SOUTHERN PACIFIC TRANSPORTATION COMPANY,

Petitioner,

v.

HARCON BARGE COMPANY, INC., D & G BOAT RENTALS, INC. AND THE M/V CHARLES D TIDEWATER-VENICE, INC. AND THE M/V IBERVILLE, ARTHUR SMITH CORPORATION AND THE M/V I.C. HOSKINS, AND CANAL BARGE COMPANY AND THE M/V MARIAN HAGESTAD,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Respondents accept the characterization of the questions presented for review presented by petitioner as Questions I through IV, but add as an additional question Question V, which is set forth below.

V.

Is there any basis for the Court to consider the Petition for Certiorari since the decision of the Court below is not in conflict with the decision of any other federal court of appeals nor is it in any way within the sample parameters set forth in Rule 17.1 of this Court?

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STATEMENT OF THE CASE

This brief is being filed on behalf of D & G BOAT RENTALS, INC., TIDEWATER VENICE, INC., ARTHUR SMITH CORPORATION, HARCON BARGE CO., INC. and CANAL BARGE COMPANY, respondents herein. Unless a specific party is referred to by name, the foregoing parties will be referred to collectively as "RESPONDENTS".

The statement of facts set forth by petitioner, SOUTHERN PACIFIC TRANSPORTATION COMPANY ("SOUTHERN PACIFIC") is essentially correct and accepted by RESPONDENTS except as is set forth hereinafter.

As was noted in the original opinion rendered by the Court of Appeals, 746 F.2d 278, 284-285, the lawsuit filed by HARCON BARGE CO., INC. which bore Docket No. 79-1592 in the District Court was designated as the lead case when the Court ordered consolidation of all cases. At the time of the consolidation an entry was made on the docket sheet of each case other than the lead case as follows:

> " '*See* 791592 [i.e., *Harcon Barge v. D & G Boat Rentals*] *for all future entries* except those pertaining only to [docket number of the particular action of the consolidated cases].' " 746 F.2d 278, 284.

All of the entires thereafter were made on the docket sheet of *Harcon,* the lead case, including the entry concerning the Motion to Amend, Notice of Appeal and all other post-trial filings in the case.

In the en banc opinion rendered on March 12, 1986 (Appendix I), the Court definitively classified the post-

judgment motion filed by TIDEWATER VENICE, INC. as a motion seeking relief under Rule 59(e) (784 F.2d 665 [5th Cir. 1986]). At Page I-9 the following language occurs in the opinion of the Court:

> "They styled their motion as one to amend or alter the judgment and they served it within ten days after the entry of the judgment. The motion sought relief available under Rule 59(e), did not seek merely to correct a clerical error in the judgment, and was served within that rule's time limits. Although the motion itself does not specify under which rule it was being brought, it nevertheless falls squarely within the province of Rule 59(e)."

—o—

SUMMARY OF THE ARGUMENT

I. The rule adopted by the Fifth Circuit promotes certainty in appellate procedure, comports with the intent of the Federal Rules of Civil Procedure and the Federal Rules of Appellate Procedure and puts to an end any uncertainty or confusion with respect to post-judgment practice.

II. The fact that a particular motion may conceivably be properly made under some provision of Rule 60 does not mean that it is not also a Rule 59(e) motion.

III. A motion to amend the single judgment rendered in consolidated cases affects the judgment in general and, therefore, all cases.

IV. Rule 2 of the Federal Rules of Appellate Procedure does not apply to jurisdictional questions.

V. This case does not fall within the parameters set forth in the Court's rules for granting certiorari.

ARGUMENT

I. Since the 1979 revision of the Federal Rules of Appellate Procedure, the concept of joint jurisdiction over a particular cause by a Federal District Court and a Federal Court of Appeals has ceased to exist. With the decision of this Court in *Griggs vs. Provident Consumer Discount Company,* 459 U.S. 56, 103 S.Ct. 400, 74 L.Ed.2d 225 (1982), notice has been served on all litigants that the provisions of Rule 4(a)(4) are to be literally interpreted and applied.

Such an interpretation and enforcement of the rules serves several purposes, chief of which is the clarification of the timetable applicable to the litigants and clear delineation of which Court has jurisdiction.

Cases on the point show that there is a long history of debate as to whether a motion is cognizable under Rule 59(e), 60(a) or 60(b). Because of this long standing dispute there has been obvious uncertainty as to whether additional notices of appeal were required, whether in fact a particular judgment was appealable, or whether a litigant was prevented from proceeding any further because the litigant's time under Rule 59(e) had expired. For example, the Seventh Circuit noted in *A. D. Weiss Lithograph Co., Inc. vs. Illinois Adhesive Products Co.,* 705 F.2d 249, 249-50 (7th Cir. 1983):

> "It would make life a good deal easier for all concerned if parties moving under Rule 59(e) would always caption such motions 'Motions to Alter or Amend Judgment' rather than 'Motions to Reconsider,' and thereby dispel any doubt whether the motion is under Rule 59(e) or Rule 60(b)—rules with very different procedural consequences as this case illustrates. But

> the caption is not essential. One must look to the body of the motion, and see what the movant wants."

The rule announced by the Fifth Circuit in its en banc decision completely eliminates the necessity of any such characterization of a motion and indeed, eliminates the inquiry. Litigants now know that a motion filed within ten (10) days of the entry of judgment is to be treated as a Rule 59(e) motion. One need not engage in sophisticated and possibly esoteric analysis of the content of the motion, one need only look at the time when the motion was filed.

This specific solution was proposed by the Seventh Circuit when it said:

> "Post-judgment motions filed within ten (10) days should where possible be construed as Rule 59(e) motions to avoid otherwise endless hassles over proper characterization." *Western Industries, Inc. vs. Newcor Canada, Ltd.*, 709 F.2d 16, 17 (7th Cir. 1983).

Other Courts have also felt the same way.

> "In general, a post-judgment motion that questions the correctness of the judgment is properly treated as a Rule 59(e) motion if it is filed within ten (10) days of entry of judgment." *Miller vs. Leavenworth-Jefferson Electric Co-Op*, 653 F.2d 1378, 1380 (10th Cir. 1981); Accord, *Dove vs. CODESCO*, 569 F.2d 807 (4th Cir. 1978); *Vreeken vs. Davis*, 718 F.2d 343 (10th Cir. 1983).

As is obvious from the citations above, the rule adopted by the Fifth Circuit has been advocated and approved by the Fourth, Seventh and Tenth Circuits and has not been criticized by any other Court of Appeal. The rule allows for the finality of judgments absent a strong showing of

extraordinary circumstances which would bring into play Rule 60(a).

Petitioner makes the following statement on Page 14 of its brief:

> "The 'bright-line' rule creates waste, expands the instances in which multiple notices of appeal will be required, and creates a multitude of problems."

Petitioner obviously misapprehends the effect of the rule since the implementation of the rule has the direct opposite effect of that claimed by petitioner. Rather than expanding instances of multiple notices of appeal, the bright-line rule in fact completely eliminates any necessity for multiple notices of appeal except in those cases in which multiple notices could not possibly be avoided even without the bright-line rule. Far from creating a multitude of problems, the appellate process is simplified since, as noted above, neither litigants nor the Courts any longer have to indulge in speculation to conclude whether a specific motion is a Rule 59(e) motion or a Rule 60 motion.

Additionally, petitioner claims that there is no basis for the decision of the Court of Appeal since *Griggs* did not even deal with the application of Rule 60. It is respectfully submitted that even the dissent in the *Griggs* case pointed out that the Courts have " . . . almost without exception treated these as Rule 59 motions, regardless of their label." 459 U.S. 56, 68, 103 S.Ct. 400, 407. Continuing, the dissent pointed out:

> "Indeed, even motions captioned under Rule 60(b) but filed within ten days of judgment, are normally deemed Rule 59 motions."

Even petitioner has relied on Rule 4(a) to obtain dismissal of an appeal. *In Re M D L 262,* 85-2495 (Slip Opinion Filed September 17, 1986) is a case decided by the Fifth Circuit which granted a motion by Southern Pacific to dismiss an appeal which was filed out of time. The court in that case stated:

> "There is a necessity for providing a precisely ascertainable point at which litigation comes to an end." (Slip Opinion 9683, 9687)

Huff v. International Longshoremen's Association Local #24, 86-2212 (Slip Opinion filed September 19, 1986), specifically uses and approves the *Harcon* rule and points out the previous difficulties in classifying motions.

The jurisprudence is uniform and without contradiction that the "bright-line" rule is sensible, comports with the intent of the Rules, ends uncertainty and assists litigants and the Courts alike.

II. SOUTHERN PACIFIC goes to great lengths to urge the contention that the Fifth Circuit vacated on rehearing that portion of the panel opinion which found that TIDEWATER's Motion to Amend Judgment was a Rule 59(e) motion rather than a Rule 60(b) motion. The Railroad further urges in its Petition that the question of identification of the rule under which the TIDEWATER motion was brought was left unaddressed by the Court on rehearing. Even though this point is relevant only to whether or not the motion was a Rule 60(a) motion, this contention conveniently though clearly overlooks and disregards the findings of the Court as expressed in Part A of the opinion on rehearing:

> In the instant case, the moving defendants sought to amend the judgment of the district court as to the

> costs assessed against them. They styled their motion as one to amend or alter the judgment and they served it within ten (10) days after the entry of the judgment. The motion sought relief available under Rule 59(e), did not seek merely to correct a clerical error in the judgment, and was served within that rule's time limits. Although the motion itself does not specify under which rule *it was being brought, it nevertheless falls squarely within the province of Rule 59(e).*
>
> 784 F.2d 665, 668 (5th Cir. 1986). (emphasis provided).

This *en banc* determination by the Court of Appeals is perfectly congruous with the earlier finding by the late Judge Tate as expressed in the original panel opinion:

> The motion to amend was "(a) motion to amend or alter the judgment" under Federal Rules of Civil Procedure 59(e), which had the effect under Federal Appellant Procedure Rule 4(a)(4) of nullifying any previous notice of appeal and, further, of commencing the delay within which to take an appeal only after this motion was disposed of.
>
> *Harcon Barge Co., Inc. v. D & G Boat Rentals, Inc.,* 746 F.2d 278, 288 (5th Cir. 1984).

Judge Tate purely and simply recognized that the TIDEWATER motion (" . . . which looks and reads like and *is* a Rule 59(e) motion") is not subject to being retrospectively recast on appeal by the Railroad as a Rule 60 motion merely because the relief sought by TIDEWATER may have been obtainable under both rules. This entire contention is manifestly an after-the-fact effort by SOUTHERN PACIFIC to evade the effects of Rule 4(a)(4) in consequence of the Railroad's failure to file a timely notice of appeal.

The authorities cited by the Railroad in its petition, which suggest that the TIDEWATER motion may have been properly assertable under some rule other than 59(e), are inapposite, for exclusivity is certainly not the hallmark of the relief available under Rules 59(e) and 60. See *11 Wright and Miller, Federal Practice and Procedure,* Sec. 2817 at pp. 110-13 (1973). The appropriate inquiry, then, is whether the motion falls within the scope of Rule 59(e), and every court which has considered the TIDEWATER Motion to Amend Judgment has without hesitation recognized that it is indeed a Rule 59(e) motion. Ergo, since the TIDEWATER motion was timely served within ten (10) days of entry of judgment as Rule 59(e) requires, the Court must consider it to be a Rule 59(e) motion for purposes of Rule 4(a)(4) of the Federal Rules of Appellate Procedure, since timing of the motion is fundamental in classifying the motion as having been brought under Rule 59(e) or Rule 60. As a Rule 59(e) motion, the TIDEWATER motion vitiated the effect of the railroad's notice of appeal, and as Professor Moore has observed, under those circumstances "the appeal simply self destructs." 9 *J. Moore, B. Ward and J. Lucus, Moore's Federal Practice,* Sec. 204.12(1), pp. 4-65, n. 17 (1982), quoted approvingly in *Griggs v. Provident Consumer Discount Co.,* 103 S.Ct. 400 (1982).

The record in this case reveals that both the TIDE WATER Motion to Amend Judgment and the SOUTHERN PACIFIC Notice of Appeal were docketed on the same day (December 21, 1982), although the motion appears to have been docketed ahead of the notice on that day. Nevertheless, a *subsequent* notice of appeal is likewise of no effect when it is filed while a timely Rule 59 motion is

pending. Viewed either way, the SOUTHERN PACIFIC notice of appeal is invalid under Rule 4(a)(4) of the Federal Rules of Appellate Procedure, and the action of the Court of Appeals was correct.

III. Petitioner complains in its application that the consolidation of the cases has "deprived petitioner of its precious right of appeal." This is in fact erroneous since consolidation has nothing to do with petitioner being deprived of its right of appeal. What, and all that has occurred is that petitioner is looking for any way out of the position in which it finds itself and is now complaining about the consolidation as a possible avenue of escape.

As was pointed out in the panel opinion in the Court of Appeal, petitioner is the party that moved for the consolidation of all cases. Appendix G 9, 10. Indeed, the notice of appeal filed by petitioner was docketed only in the lead case, the *Harcon* case number 75-1592. Appendix G 11, 12. The panel opinion noted that SOUTHERN PACIFIC in its notice of appeal filed only one notice of appeal and characterized it as appealing from "*the* Final Judgment entered in said actions on the 8th day of December, 1982". Appendix G 13. Continuing, the panel pointed out that petitioner paid only a single filing fee and, in all respects treated its attempted appeal as occurring in a fully and completely consolidated case.

Petitioner is thus on the horns of a dilemma. On the one hand it argues that a motion directed to the judgment is in fact a motion that affects only one of the cases, not all of the cases. However, if that were the case, the attempted appeal of petitioner would be wholly ineffective in any event except for the *Harcon* case, the lead case, in which the notice of appeal was actually filed.

However, obviously that is not the correct result. The five cases have been consolidated throughout, at the instance of petitioner, and over the opposition of the other parties to the suit. Notwithstanding this, the Court, petitioner and all parties have been treating these cases as consolidated for all purposes until this very day. Indeed, to have maintained the separateness of the suits, to have required separate docket entries and, to have preserved their separate character would have vitiated completely the benign purposes of Rule 42(a). The action of the Court of Appeals was eminently correct and should not be disturbed by this Court.

IV. In a last ditch argument, SOUTHERN PACIFIC contends that Rule 2 of the Federal Rules of Appellate Procedure should be invoked in order that the Rules might be suspended and its oversight condoned and then cured. This same argument was unsuccessfully advanced in *Griggs, supra,* where the Supreme Court held that not only was the notice of appeal defective, it was an absolute nullity. In the oft-quoted words of the Court:

> "Under the plain language of the current Rule, a premature notice of appeal 'shall have no effect'; a new notice of appeal 'must be filed.' In short, it is as if no notice of appeal were filed at all. And if no notice of appeal is filed at all, the Court of Appeals lacks jurisdiction to act. It is well settled that the requirement of a timely notice of appeal is 'mandatory and jurisdictional.' *Browder v. Director, Illinois Dept. of Corrections,* 434 U.S. 257, 264, 98 S.Ct. 556, 560, 54 L.Ed.2d 521 (1978)." Id. at p. 403.

In a footnote, the *Griggs* Court observed that Rule 2 does not purport to vest unlimited discretion in the Court of

Appeals, and any such discretion is limited in any event by Rule 26(b), which prohibits the Courts of Appeals from enlarging the time for filing a notice of appeal. Moreover, the notions of certainty, timeliness and order would be rendered meaningless under a system where Rule 2 could be cavalierly invoked to retrospectively circumvent the explicit prohibitory language of Rule 4(a)(4). There is no compelling purpose which would be served by allowing SOUTHERN PACIFIC to deviate from the letter and spirit of the Federal Rules of Appellate Procedure under these circumstances. In any event, the Court of Appeals did not deem it appropriate in this instance to attempt to invoke Rule 2 and suspend the provisions of Rule 4(a)(4), which would have presumably accorded retrospective validity and new life to the SOUTHERN PACIFIC notice of appeal. That decision was certainly no abuse of discretion by the Court of Appeals, and therefore cannot be challenged here.

V. There is simply no basis for this Court to grant the application for certiorari. As is set forth in Rule 17 of this Court review on Writ of Certiorari is a matter of judicial discretion, not a matter of right. There must be "special and important reasons" for this Court to grant a Writ of Certiorari. It is respectfully submitted that, as is shown above, there is neither a special nor an important reason for this Court to grant the Writ of Certiorari.

There is no conflict in the circuits, as is indicated in the foregoing brief nor is there a decision of a State Court or Federal Court of Appeals whch is contrary or in conflict with the applicable decisions of this Court. In fact, all of the decisions reviewed harmonize with the decision of the en banc Court in this case.

Accordingly, this Court should deny the petition for Writ of Certiorari.

CONCLUSION

The decision of the Fifth Circuit Court of Appeals puts to rest previously existing issues and uncertainties and provides a reliable beacon for litigants to comfortably navigate the rocks and shoals of appellate practice. The "bright-line" rule points the way for appellate practitioners to know what actions should be taken to preserve the rights of their clients. Accordingly, this Honorable Court should deny the application for certiorari.

Respectfully submitted,

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